(30,900)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 935

THE UNITED STATES EX REL. F. C. RUTZ, APPELLANT,

vs.

ROBERT R. LEVY, UNITED STATES MARSHAL IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 9, 1925

[fols. 1 & 2] CAPTION—Omitted

[fol. 3] **IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

No. 35089, —— Term, 1924

UNITED STATES EX REL. F. C. RUTZ

vs.

ROBERT R. LEVY, United States Marshal

PETITION FOR WRIT OF HABEAS CORPUS AND CERTIORARI—Filed January 14, 1925

To the Honorable the Judges of the said Court:

The petition of F. C. Rutz respectfully represents:

1. Your petitioner, F. C. Rutz, is a citizen of the United States and is a resident of the County of Winnebago, State of Illinois and of this District.

2. Your petitioner is now actually, unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the United States in the custody of Robert R. Levy, United States Marshal for the Northern District of Illinois, to-wit, at the City of Chicago in said District.

3. The sole claim and authority by virtue of which the said Robert R. Levy, United States Marshal, so restrains and detains your petitioner is a warrant of arrest issue in a certain proceeding for a warrant of removal to be issued under Section 1014 Revised Statutes of the United States, for the purpose of removing your petitioner from the Northern District of Illinois to the Northern District of Ohio, Eastern Division, at Cleveland. The said proceeding was instituted in the first place before United States Commissioner James R. Glass. On December 2, 1924, your petitioner, pursuant to notice [fol. 4] that his presence was required before said United States Commissioner, presented himself before the said Commissioner at Chicago and was then detained by color of the authority of said Marshal. Hearing upon said proceeding was held by the said Commissioner on December 11, 15, 16, 17, 18, 19 and 20, 1924, at which hearing the evidence adduced on behalf of the United States consisted solely of the introduction of a properly certified copy of an indictment returned on March 27, 1924, and filed in the District Court of the United States of America for the Northern District of Ohio, Eastern Division (a copy of which is hereto attached, made a part hereof and marked "Exhibit A"), and the identification of your petitioner as one of the persons named in said indictment. Your petitioner, on

the other hand, testified at length and was subjected to full cross-examination and also introduced the testimony of three witnesses on his behalf. At the conclusion of the presentation of testimony on behalf of your petitioner, the United States was given full opportunity to present evidence in rebuttal of said testimony, but offered no testimony in rebuttal. On December 20, 1924, after a full hearing as aforesaid the said Commissioner held that there was no probable cause for believing your petitioner guilty of the offense charged in said indictment and discharged your petitioner, delivering an opinion, a copy of which is attached hereto, made a part hereof and marked "Exhibit B." Your petitioner offers to produce a certified copy of the transcript of said proceedings, including the evidence received at said hearing.

4. Notwithstanding the said discharge of your petitioner, a new complaint against your petitioner (copy of which is attached hereto, made a part hereof and marked "Exhibit C") based upon the same indictment ("Exhibit A"), was filed by the United States Attorney on December 24, 1924, before the Honorable Adam C. Cliffe, [fol. 5] District Judge of the said Court, who upon objection raised on behalf of your petitioner that there was no authority or warrant of law for such de novo proceeding, set the question raised by said objection for argument on January 12, 1925, and ordered that your petitioner be present at said hearing. At the conclusion of the argument on January 12, 1925, although counsel for the United States made no showing, allegation, or claim that there had been any fraud, bias, error, or any impropriety whatsoever in the said proceedings before the said Commissioner or in said prior discharge of your petitioner, and although the said District Judge did not in fact have before him any transcript of said proceedings showing the evidence adduced at said hearing before the said Commissioner and the ruling or opinion of the said Commissioner discharging your petitioner, the said District Judge, without any warrant or authority of law, held that such de novo proceeding for the removal of your petitioner was proper and ordered that your petitioner appear for a hearing under the said complaint before the said District Judge on January 14, 1925, at 2:00 p. m. A full transcript of the proceedings had before the said District Judge on January 12, 1925, is attached hereto, made a part hereof and marked "Exhibit D." On January 14, 1925, the said District Judge ordered a warrant of arrest to issue against your petitioner, and in pursuance of said warrant your petitioner was thereupon placed under arrest by the said United States Marshal and is now in the custody of the said United States Marshal.

5. Your petitioner further represents that he was discharged by the said Commissioner after a full hearing at which the United [fol. 6] States and your petitioner were given full opportunity to introduce evidence bearing upon the question of probable cause as aforesaid, and that in the absence of any showing, allegation, or claim that there had been fraud, bias, error, or any impropriety whatsoever in said proceedings before the said Commissioner or in the said discharge of your petitioner, the action of the said District Judge in receiving the said complaint filed before him and in holding your peti-

tioner for a hearing under the said complaint is unwarranted and without authority of law and in violation of the constitutional and statutory rights of your petitioner.

Wherefore, for the above and other reasons, your petitioner is advised and accordingly alleges that the said de novo proceedings before the said United States District Judge were and are without warrant or authority of law and your petitioner is now confined and deprived of his liberty in violation of the Constitution of the United States and the Fifth and Sixth Amendments thereof, and in violation of the statutes of the United States.

Your petitioner therefore prays that a writ of habeas corpus may be issued, directed to the said Robert R. Levy, Marshal of the United States as aforesaid, and to each and all of his deputies, requiring him and them to bring and have your petitioner before this court at a time to be by this court determined, together with the true cause of the detention of your petitioner, to the end that due inquiry may be had in the premises, and that a writ of certiorari may at the same time issue, directed to the said James R. Glass, United States Commissioner for the Northern District of Illinois, directing him to certify to this [fol. 7] court all the proceedings that took place before him and all the evidence that was offered before him in the said proceedings and that this court may proceed to determine the facts of this case in that regard and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice may require; and your petitioner will ever pray, etc.

Dated at Chicago, State of Illinois, the 14th day of January, A. D. 1925.

F. C. Rutz.

Sworn to by F. C. Rutz. Jurat omitted in printing.

[fol. 8] EXHIBIT "A" TO PETITION

NORTHERN DISTRICT OF OHIO,
Eastern Division, ss:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, OF THE FEBRUARY TERM, IN THE YEAR 1924

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Ohio, at the February Term of said Court in the year 1924, and inquiring for said division and district, upon their oath present, that throughout the period of time extending from January 1, 1917, to and including the day of the finding and presentation of this indictment, malleable iron castings, bought and used extensively by manufacturers of automotive vehicles and machinery, railroad equipment, agricultural implements and various other kinds of vehicles, machinery tools, and apparatus (hereinafter referred to collectively as purchasers), have been manufactured in large quantities by certain corporations, a list of which, showing their corporate names, the States of their incorporation and the location of their several foundries, is as follows, to wit:

Name	State of incorporation	Location of foundries
National Malleable and Steel Castings Company	Ohio	Cleveland and Toledo, Ohio; Chicago and East St. Louis, Ill.; Indianapolis, Ind.
The National Malleable Castings Company	Ohio	Cleveland and Toledo, Ohio; Chicago and East St. Louis, Ill.; Indianapolis, Ind.
The Eastern Malleable Iron Company, also trading as Bridgeport Malleable Iron Works, Naugatuck Malleable Iron Works, Troy Malleable Iron Works, Wilmington Malleable Iron Works, and Vulcan Iron Works.	Connecticut	Bridgeport, Naugatuck and New Britain, Conn.; Troy, New York; Wilmington, Del.
[fol. 9] The Dayton Malleable Iron Company	Ohio	Dayton and Ironton, Ohio.
Albany Malleable Iron Company	New York	Albany, New York.
The Albion Malleable Iron Company	Michigan	Albion, Michigan.
The American Malleable Castings Company	Ohio	Marion, Ohio.
Badger Malleable & Manufacturing Company	Wisconsin	South Milwaukee, Wis.
Belle City Malleable Iron Company	Wisconsin	Racine, Wis.
Chicago Steel Castings Company (formerly named Chicago Malleable Castings Company)	Illinois	West Pullman, Chicago, Ill.
The Columbus Malleable Iron Company	Ohio	Columbus, Ohio.
Danville Malleable Iron Company	Illinois	Danville, Ill.
Decatur Malleable Iron Company	Illinois	Decatur, Ill.
Thomas Devlin Manufacturing Company	New Jersey	Philadelphia, Pa.
Erie Malleable Iron Company	Pennsylvania	Erie, Pa.
Federal Malleable Company	Wisconsin	West Allis, Wis.
Fort Pitt Malleable and Grey Iron Company	Pennsylvania	Pittsburgh, Pa.
Frazer & Jones Company	New York	Syracuse, N. Y.
Illinois Malleable Iron Company	Illinois	Chicago, Ill.
Iowa Malleable Iron Company	Iowa	Fairfield, Iowa.

Kalamazoo Malleable Iron Co.	Michigan	Kalamazoo, Mich.
The Kennedy Corporation, also trading as Baltimore Malleable Iron & Steel Casting Co.	Maryland	Baltimore, Md.
Laconia Car Company	Massachusetts	Laconia, New Hampshire.
Lakeside Malleable Castings Company	Wisconsin	Racine, Wis.
[fol. 10] Lancaster Foundry Company	Pennsylvania	Lancaster, Pa.
The Marion Malleable Iron Works	Indiana	Marion, Ind.
Meeker Foundry Company	New Jersey	Newark, N. Jersey.
Moline Malleable Iron Company	Illinois	St. Charles, Ill.
Northern Malleable Iron Company	Minnesota	St. Paul, Minn.
Northwestern Malleable Iron Company	Wisconsin	Milwaukee, Wis.
Pittsburgh Malleable Iron Company	Pennsylvania	Pittsburgh, Pa.
Rhode Island Malleable Iron Works	Rhode Island	Hillsgrove, R. I.
Rockford Malleable Iron Works	Illinois	Rockford, Ill.
Ross-Meehan Foundries	Tennessee	Chattanooga, Tenn.
St. Louis Malleable Casting Company	Missouri	St. Louis, Mo.
The Standard Wheel Company, also trading as Standard Malleable Castings Company	Indiana	Terre Haute, Ind.
Stanley G. Flagg & Co., Inc.	Pennsylvania	Philadelphia, Pa.
The Stowell Company	Wisconsin	South Milwaukee, Wis.
The Springfield Malleable Iron Company	Ohio	Springfield, Ohio.
Temple Malleable Iron and Steel Company	Pennsylvania	Temple, Pa.
The Trenton Malleable Iron Company	New Jersey	Trenton, N. J.
Vermilion Malleable Iron Company	Illinois	Hoopeston, Ill.
Wanner Malleable Castings Company	Illinois	Hammond, Ind.
Wisconsin Malleable Iron Co.	Wisconsin	Milwaukee, Wis.
The Zanesville Malleable Co.	Ohio	Zanesville, Ohio.
The Union Malleable Iron Company	Illinois	East Moline, Ill.
The Warren Tool and Forge Company	Ohio	Warren, Ohio.

[fol. 11] all of which said corporations are made defendants to this indictment; that the above named corporations during said period of time, together have manufactured approximately 500,000 tons of said malleable iron castings annually, that is to say, approximately 75 per cent of all such castings manufactured in the United States; that said corporations, throughout said period of time, have sold large quantities of said malleable iron castings so manufactured by them to purchasers in states other than the State or States in which they were so manufactured, and have, in pursuance of said sales, shipped such castings from the several States wherein they have been so manufactured to said purchasers thereof in such other states; that many of said corporations, throughout said period of time, have sold and shipped large quantities of said malleable iron castings from other states than said State of Ohio to purchasers in said Eastern Division of said Northern District of Ohio; that said purchasers in other states than said states of manufacture to whom said malleable iron castings have been so sold and shipped by said corporations are so numerous that it is impracticable to set forth their names in this indictment; that said corporations, throughout said period of time, in so selling and shipping the malleable iron castings manufactured by them as aforesaid to purchasers in States other than those in which the said castings were so manufactured, have carried on trade and commerce among the several States of the United States within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act To Protect Trade And Commerce Against Unlawful Restraints And Monopolies"; and that, because said corporations, in so carrying on said trade and commerce have been, throughout said period of time, separate entities, independent of each other, as the grand jurors upon their said oath charge the fact to be, they should have competed with each other fully and should have refrained from engaging in any unlawful combination in restraint of said interstate trade and commerce such as that hereinafter described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said corporations, throughout the said period of time, respectively have had divers officers and agents who have [fol. 12] been actively engaged in the management, direction and control of their affairs and business and of their said interstate trade and commerce, and that a list of the names of such officers and agents, so far as they are known to said grand jurors (Christian names unknown to said grand jurors being indicated by initial letters), showing with which of said corporations they have been affiliated during said period of time, is as follows, to wit:

Name	Affiliation
S. L. Smith	National Malleable and Steel Castings Company, and The National Malleable Castings Company.
C. L. Berger	The Eastern Malleable Iron Company.
P. J. Schilling	The Eastern Malleable Iron Company.
J. C. Haswell	The Dayton Malleable Iron Company.
Frederick V. Griesman	Albany Malleable Iron Company.
H. B. Parker	The Albion Malleable Iron Company.
Carl F. La Marche	The American Malleable Castings Company.
A. J. Ricker	Badger Malleable & Manufacturing Company.
C. S. Anderson	Belle City Malleable Iron Company.
John T. Llewellyn	Chicago Steel Castings Company, formerly named Chicago Malleable Castings Company.
George H. Thompson	The Columbus Malleable Iron Company.
H. C. Smith	Danville Malleable Iron Company.
Donald E. Willard	Decatur Malleable Iron Company.
Louis J. McGrath	Thomas Devlin Manufacturing Company.
E. E. Walker	Erie Malleable Iron Company.
O. L. Hollister	Federal Malleable Company.
Frank J. Lanahan	Fort Pitt Malleable and Grey Iron Company.
Fred Frazer	Frazer & Jones Company.
J. R. Steneck	Illinois Malleable Iron Company.
W. V. Hughes	Iowa Malleable Iron Company.
E. C. Howell	Kalamazoo Malleable Iron Company.
[fol. 13]	
Joseph P. Kennedy	The Kennedy Corporation.
E. J. Fitzgerald	Laconia Car Company.
John G. Osborne	Lakeside Malleable Castings Company.
H. Lloyd Hess	Lancaster Foundry Company.
Edwin F. Leigh	The Marion Malleable Iron Works.
Stephen J. Meeker	Meeker Foundry Company.
R. R. Fauntelroy	Moline Malleable Iron Company.
Frank J. Ottis	Northern Malleable Iron Company.
William C. McMahon	Northwestern Malleable Iron Company.
John B. Coates	Pittsburgh Malleable Iron Company.
H. L. Steeves	Rhode Island Malleable Iron Works.
F. C. Rutz	Rockford Malleable Iron Works.
G. F. Meehan	Ross-Meehan Foundries.
Henry Luedinghaus, Jr.	St. Louis Malleable Castings Company.
Todd T. Zachary	The Standard Wheel Company.
A. E. Shaw	Stanley G. Flagg & Co. Inc.
Rupert A. Nourse	The Stowell Company.

Name	Affiliation
T. W. Ludlow	The Springfield Malleable Iron Company.
Edwin C. Donaghy	Temple Malleable Iron & Steel Company.
Frank J. Eppele	The Trenton Malleable Iron Company.
F. C. Moore	Vermilion Malleable Iron Company.
Harry C. Wanner	Wanner Malleable Castings Company.
W. P. Westenberg	Wisconsin Malleable Iron Company.
P. A. Kern	The Zanesville Malleable Company.
J. L. Simson	The Union Malleable Iron Company.
E. T. Ward	The Warren Tool and Forge Company.

and said officers and agents are also made defendants to this indictment.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, throughout said period of time, Robert E. Belt has been Secretary of The American Malleable Castings Association hereinafter mentioned, a voluntary trade organization with head- [fol. 14] quarters at Cleveland, in said division and district, of which each of said corporations above listed throughout said period has been a member, and through, and by means of which the unlawful com*g*ination hereinafter more fully described has been largely carried out; said Robert E. Belt also being made a defendant to this indictment, because he has, throughout said period, been actively engaged in the management, direction and control of the affairs of said association, and has participated in said unlawful combination.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that continuously throughout said period of time and therefore throughout the three years next preceding the finding and presentation of this indictment, at and within said Eastern Division of said Northern District of Ohio, said corporate defendants, said individual defendants, and said Robert E. Belt, each then well knowing all the premises aforesaid, unlawfully have engaged in a combination in restraint of said interstate trade and commerce in malleable iron castings so carried on by said corporate defendants, that is to say, in a combination now here described in restraint of, and which throughout said period of time, has unlawfully restrained said trade and commerce, in the manner hereinafter set forth;

Throughout said period of time said corporate defendants, under said management, direction and control of their said officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves, as to prices, terms and conditions of sale, and as to customers; and, by agreement, have from time to time fixed excessive and noncompetitive prices to be

charged by all of them for said castings, and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to be [fol. 15] held as exclusive customers, and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, as a means of securing compliance on the part of each of said corporate defendants with the terms of said agreements, said corporate defendants, throughout said period of time, have been members of and have maintained an organization known as The American Malleable Castings Association, with headquarters at Cleveland, Ohio, and have required said association, among other things, to collect and receive from each of its members information as to the details of such member's business, and to distribute such information among all the members for their use in avoiding and preventing breaches of said agreements.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said corporate defendants, said individual defendants, and said Robert E. Belt, throughout the three years next preceding the finding and presentation of this indictment, at the place, and in the manner and form, aforesaid, unlawfully have engaged in a combination in restraint of trade and commerce among the several states in malleable iron castings; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

—— ——, United States Attorney.

[fol. 16] EXHIBIT B TO PETITION

BEFORE HONORABLE JAMES R. GLASS, UNITED STATES COMMISSIONER, FEDERAL BUILDING, CHICAGO

UNITED STATES OF AMERICA

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY ET AL.

In removal proceedings against F. C. Rutz (Rockford Malleable Iron Works), J. R. Steneck (Illinois Malleable Iron Company), Harry C. Wanner (Wanner Maleable Castings Company).

Appearances:

On behalf of the United States: Mr. Roger Shale, special assistant to the Attorney General of the United States, and Mr. James G. Cotter, assistant United States attorney at Chicago.

On behalf of the defendants: Messrs. Butler Lamb Foster & Pope, by Mr. Stephen A. Foster, Mr. Herbert Pope, and Mr. Allan J. Carter; Messrs. Alden, Latham & Young, by Mr. Harris C. Lutkin.

Hearings in the above removal proceedings were held in Chicago, December 11th, 15th, 16th, 17th, 18th, 19th and 20th, 1924.

The Government offered in evidence a certified copy of the indictment returned in the Northern District of Ohio, Eastern Division on March 27th, 1924. Upon each of the three above named defendants admitting his identity the Government rested.

The motion of defendants to dismiss the complaint on the ground that the indictment did not show probable cause was overruled. Thereupon each of the three defendants took the stand and testified at great length, and was subjected to full cross-examination.

Twelve witnesses, many of whom were customers of one or more of the companies of which the defendants were officers, testified as to the competition and other conditions existing in and around Chicago in the malleable industry.

[fol. 17] Thereupon the Government closed its case without attempting to put in any rebuttal evidence.

The case was then fully argued by counsel for the Government and the defendants, and immediately upon the conclusion of the arguments the Commissioner rendered the following oral opinion and discharged all of the three defendants.

Oral Opinion of Commissioner Glass, Rendered Saturday, December 20th, 1924

The COMMISSIONER:

In this case, which involves a violation of the Federal Anti-Trust Laws, the indictment offered in evidence, and received, charges that a large number of corporations, whose business was the manufacture of malleable iron castings, had an understanding and agreement to eliminate competition among themselves as to prices, terms and conditions of sale; also as to customers; and also by agreement have from time to time fixed excessive and non-competitive prices to be charged by all of them for castings; also that they quoted prices in accordance with said agreement and made sales of said castings at such prices so fixed; and further that they assigned and allotted their customers to one another to be held as exclusive customers; and that, having done those things, they have enforced such assignments by refraining directly or indirectly from competing for customers so assigned.

The indictment further charges that the various corporations before mentioned were members of the American Malleable Castings Association, which association had headquarters at Cleveland, Ohio, where the indictment involved herein was returned, and alleges that the American Malleable Castings Association, through its corporate members, had required said association to collect and receive from each of its members information as to the details of the members' busi-

[fol. 18] ness, and to distribute such information among all the member- for their use in avoiding and preventing breaches of said agreement.

That is the charge made in the indictment, which, as alleged, is a violation of section 1 of the Federal Anti-trust Law. The Govern-

ment, to sustain its contention, this being a removal proceeding, the defendants being in a different district from where the indictment was returned, offered a certified copy of the indictment, and there was no question raised as to the identity of the defendants Rutz, Steneck and Wanner, who are the defendants resisting removal before me.

The defendants, to sustain their contention that they had not violated Section 1 of the Federal Anti-trust Law, offered evidence, not only of themselves, but of customers, competitors, members of the American Malleable Castings Association, and non-members of the American Malleable Castings Association. The evidence submitted by the witnesses to a large extent was to establish that competition existed between the various malleable iron companies, and especially between the companies represented by the defendants involved in this proceeding.

In the evidence of Mr. Rutz, who is an officer of the Rockford Malleable Iron Company, he admitted membership in the American Malleable Castings Association, and stated that he knew of its purposes. It appeared from his testimony that it was established and maintained for research work relative to malleable iron castings, and also that there was intercourse of business matters between members of said association, but he denied that there was any agreement or understanding, verbally or in writing, or otherwise, that they were [fol. 19] to eliminate competition among themselves; and he also denied that they or he had at any time known of fixing of excessive and non-competitive prices in relation to malleable iron castings; also that he had ever assigned or allotted any of its customers to any other member or even non-member of the American Malleable Castings Association, or that he ever held any exclusive customers through any understanding or agreement with any members of the American Malleable Castings Association; or that there had ever been enforced any such assignments by refraining directly or indirectly from competing for customers so assigned. And, from the evidence, it would appear that there was active competition in the malleable iron industry, not only among members of the American Malleable Castings Association, but among those that were not members of the association.

Now, with regard to the Illinois Malleable Iron Company, of which Mr. Steneck, one of the defendants here, is the representative, as to competition, the evidence showed much the same situation as did the evidence offered by the defense on behalf of the Rockford Malleable Iron Company. Instance after instance was shown in evidence of efforts to secure business, of prices that were very close; and evidence of the magnitude of the factory or plant, of the desire to keep it in going condition for the purpose of keeping their organization together, of the necessity of keeping men employed that were skilled in their line, which caused them to compete closely over and above the cost of their business. And the evidence further showed that in some instances, at least one, they have taken some business at less than cost for the purpose of keeping their plant going.

[fol. 20] That company also was a member of the American Malleable Castings Association, frankly admitted by the witness Mr. Steneck and that he had attended some of the meetings. And he also stated in his testimony the conditions on which his organization went into the American Malleable Castings Association, to the effect that if it had nothing to do with fixing prices, his company would go in. He swears positively on the stand that it had nothing to do with the fixing of prices, although it furnished information when requested of what like material was being produced for and the prices charged by other concerns who were doing the same kind of work for customers.

It appears from what Mr. Steneck testified to, that back in '17 and '18, and '19 probably, there was a schedule gotten out by the association; in fact, from what I grasp, there were two, one being called a blue schedule, and another a white schedule, but he said he did not use them unless it might have been a very small local order that they wished to give an immediate price on, and that was the only instance when that was used, that is the schedule. If I recollect right, I think that applied to both schedules, although the white had a little different purpose. I have forgotten that now.

Also Mr. Steneck testified that the accountants of his concern that had charge of costs met monthly, or periodically, at any rate, with the cost clerks or those that represented the various companies that had charge of that matter, but he had never been present at any of those meetings. He did testify that the clerk or person who attended the meeting would report back to him with the summary, I be- [fol. 21] lieve, of the cost of production by the various concerns who were at this meeting, and it would be given to him, Mr. Steneck, and would then be considered by him and the president of his company.

As I have said, on the question of competition, there seems to be ample evidence that there was competition with the Illinois Malleable Iron Company in securing their business, although from what I could grasp, it is evidently one of the largest, if not the largest, of any that I have heard about in this case.

Now, as to the Wanner Company, as to evidence of competition, that company being limited to the time it has been in existence as an Illinois corporation, which is the corporation charged in the indictment, and therefore the evidence, limited to the life of that corporation, up to the date of the indictment, showed competition, every effort being used to secure business, no evidence of handing out business to any other concerns, and the competition being as to prices. Sveral instances were offered in evidence of keen competition for prices, with a variance involved of only a quarter-cent a pound, which it was testified is sometimes considered a sufficient profit per pound in that line of industry.

The Wanner Company was also a member of the American Malleable Castings Association. A list of customers had been sent in by the Wanner Company, although not with the knowledge or consent of the defendant in this case, as appears from the evidence, [fol. 22] and he also testified it would not have been sent in if he

had known it was to be. I do not know why; that did not appear in evidence, and was not brought out.

Having gone over the evidence just casually, showing the substance of it, it devolves upon me to decide whether the indictment offered in this case is sufficient to overcome all of the direct testimony on the part of the defendants that they did not do the things that are set forth in the indictment. It may be said that you do not have to establish an agreement or an understanding, but if the facts are such that it appears that there was an understanding and agreement, that would be sufficient and just as good as a written agreement properly setting out all the things that were to be done. But, has there been any evidence other than the allegation in the indictment, which the courts have held is merely an affidavit or a complaint, giving whoever has the proceeding before them, the foundation for a warrant to bring the parties before them? Or is the evidence on the prima facie case, establishing a charge, which is enough if not denied, and no evidence in denial of it is offered, sufficient for the court to hold a defendant or to remove him from one district to another?

Now, as to whether the facts that have been offered here in denial of the indictment are sufficient to overcome the allegations of the indictment that there was an understanding and agreement to do the things charged, without anything else,—there has been quite an abundance, probably a lot more than what was necessarily required to rebut or deny the allegations in the indictment. How- [fol. 23] ever, I know of the anxiety of a defendant. They do not care to allow anything to remain undone that probably ought to be done, and in that way sometimes go somewhat to extremes, as in this case. All three defendants practically covered every customer that they have, and if they did not examine as to each customer, they offered in evidence their list of customers which they testified they had secured by competition with other concerns, with a rare exception.

Some consideration probably has to be given to the law here. I am not in the least bit of doubt about my authority as a Commissioner in a removal case. I have had considerable experience almost constantly, and I have kept closely in touch with the law and decisions. I will grant that it is rare that a Federal trade or an Anti-trust law is involved, but the law of removal, as Mr. Cotter says, regardless of whether it is an anti-trust law case or a fraud case or various other crimes that could be committed, which they could be removed for,—the principle of removal must be just the same, that is there must be a sufficient indictment, an indictment that charges an offense; there must be the identity of the defendant as the one the Grand Jurors had in mind when they returned the indictment. Now, that is the Government's side of it, the Government has all of that in.

Now, what are the rights of the defendants when the Government has done all that the law gives them the right to do? They are not barred from offering competent evidence to show that there is not

probable cause that they did commit the offense. The indictment, without any opposition to it, or any denial of it in any way by any one concerned, any of the defendants concerned, is probable cause, and the courts must adopt it and act on it, and they do. That [fol. 24] was the distinction made by Mr. Justice Fuller in many of the cases that he referred to in the case Tinsley vs. Treat, 205 U. S. 20, which is a guide in practically all removal matters.

It appears to me that these defendants did not enter into an understanding or agreement to eliminate competition and the other things charged in the indictment, for the reason that the evidence very strongly shows that there was great competition, and there has been no evidence of their meetings, or what was done at their meetings which would cause me to believe that things were done at those meetings, and arrangements were made to eliminate competition, or fix non-competitive prices.

I might develop further some of the matters here, but I do not think it is necessary, and the defendants will be discharged.

[fol. 25] EXHIBIT C TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 13097

UNITED STATES OF AMERICA

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY et al., F. C. Rutz, R. R. Fauntleroy, J. R. Steneck, and Harry C. Wanner

Complaint Filed Before Judge Cliffe

Complaint

On this 24th day of December, A. D. 1924, at the City of Chicago, in the Eastern Division of the Northern District of Illinois, before the Honorable Adam C. Cliffe, Judge of the United States District Court, comes Thomas F. Mullen, Special Agent, Bureau of Investigation, at Chicago, and on his oath complains and says that F. C. Rutz, R. R. Fauntleroy, J. R. Steneck and Harry C. Wanner, and others, are individual defendants, and that Rockford Malleable Iron Works, Rockford, Illinois, Moline Malleable Iron Company, St. Charles, Illinois, Illinois Malleable Iron Company, Chicago, Illinois, and Wanner Malleable Castings Company, Hammond, Illinois, and others, are corporate defendants in and under a certain indictment hereto filed in the United States District Court for the Northern District of Ohio, Eastern Division, on the 27th day of March, A. D.

1924. And that as alleged in said indictment, beginning on the first day of January 1917, and continuing to and including the date of the finding and presentation of said indictment, to wit, the 27th day of March, A. D. 1924, the said individual defendants and the said corporate defendants, and one Robert E. Belt, Secretary of the [fol. 26] American Malleable Castings Association, a voluntary trade organization, with headquarters at Cleveland, in said division and district of Ohio, did continuously throughout said period of time, and therefore, throughout the three years next preceding the finding and presentation of this indictment, at and within said Eastern Division of said Northern District of Ohio, each then well knowing all the premises aforesaid, unlawfully engage in a combination in restraint of trade and commerce in malleable iron castings so carried on by said corporate defendants, that is to say, in a combination described as being in restraint of, and which through said period of time, has unlawfully restrained said trade and commerce in the manner and by the means set forth in said indictment, the same being in violation of Section 1 of an act commonly known as the Sherman Anti Trust Act, and contrary to the statute in such case made and provided.

That throughout said period of time said corporate defendants under said management, direction and control of their officers and agents, namely, the said individual defendants, and with such participation of said association and of said Robert E. Belt, its secretary, have carried on the said interstate trade and commerce of said corporate defendants in malleable iron castings in accordance with and pursuant to an understanding and agreement between said corporations to eliminate competition among themselves as to prices, terms and conditions of sale, and as to customers; and by agreement have, from time to time, fixed excessive and noncompetitive prices to be charged by all of them for said castings; and have accordingly quoted prices and made sales of said castings at such prices so fixed; and have assigned and allotted their customers to one another to [fol. 27] be held as exclusive customers; and have enforced such assignments by refraining directly or indirectly from competing for customers so assigned, in violation of Section 1 of the said Sherman Anti Trust Act, and contrary to the statute in such case made and provided.

That the said F. C. Rutz, R. R. Fauntleroy, J. R. Steneck and Harry C. Wanner are now within the Eastern Division of the Northern District of Illinois, and that they, among others, are defendants in the said indictment filed as aforesaid, in the District Court of the United States for the Northern District of Ohio, Eastern Division, and have not been found within the said district.

That a certified copy of the said indictment is submitted with this complaint and made a part thereof.

Wherefore, complainant prays that the said defendants may be apprehended and ordered removed to the Northern District of Ohio, Eastern Division, at Cleveland, there to be dealt with according to law.

Thomas F. Mullen.

Subscribed and sworn to before me by the above named the day and year above written. Christ F. Guenther, Deputy Clerk of the District Court of the Northern District of Illinois. (Seal of the District Court.)

[fol. 28] EXHIBIT D TO PETITION

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

NATIONAL MALLEABLE & STEEL CASTINGS COMPANY et al.

The following is a transcript of the proceedings had before his Honor Judge Adam C. Cliffe, one of the judges of said court, on Monday, January 12th, 1924, at the hour of 10 o'clock A. M.

Appearances:

Mr. Roger Shale and Mr. James G. Cotter appearing in behalf of the United States of America;

Messrs. Butler, Lamb, Foster & Pope, by Mr. Stephen A. Foster, Mr. Herbert Pope, and Mr. Allan J. Carter, Messrs. Alden, Lathan & Young, by Mr. Harris C. Lutkin, appearing in behalf of the defendants.

[fol. 29] Mr. Foster: We are ready to proceed, your Honor, for the defendants.

The Court: Are you ready?

Mr. Shale: The Government is ready.

The Court: All right. Who has got the laboring oar?

Mr. Foster: I assume the Government has, your Honor.

The Court: All right.

Mr. Foster: If your Honor please, just before the argument begins, however, in order to complete the record, we wish to offer affidavits by the defendants, just setting up the fact that there was this proceeding before Commissioner Glass, and setting up a copy of the complaint, and a copy of the Commissioner's opinion, so that it will appear in this proceeding of record, that there has been a full and complete hearing before Commissioner Glass at which the Government offered such evidence as it saw fit, and the defendants offered evidence, and then the Commissioner on a very full, and as we regard it, very fair review of the evidence held that there was lack of probable cause, and therefore discharged the defendants.

The Court: I see.

Mr. Foster: We offer these three affidavits. We will have the fourth here in a moment; it is not yet ready. It will be here in a moment.

Mr. Shale: If your Honor please, the Government objects to the [fol. 30] admission of these affidavits on the ground that they are irrelevant, immaterial, incompetent, and that we are proceeding here de novo, without regard to any other proceeding in this jurisdiction. We had no right of appeal from the proceedings before the Commissioner, and we object to the admission.

The Court: All right, sustained.

Mr. Foster: We would like to preserve an exception to your Honor's ruling in that regard, because your Honor, we desire to have the fact appear that there was a former proceeding.

The Court: You preserve your exception.

Mr. Carter: I would like to have it understood, your Honor, when we were here at the preliminary motion, that your Honor was reserving the whole question here. Now, the point that is raised on this goes to the whole merits of the proposition that was then suggested as to whether there should be a novo proceeding here.

The Court: Well, I am passing on it.

Mr. Carter: You mean you are passing on it without hearing our argument?

The Court: Yes, you are offering this evidence.

Mr. Foster: Yes.

The Court: I am passing on the motion.

[fol. 31] Mr. Foster: I will ask to have them identified, if your Honor please, as defendants' exhibits 1, 2 and 3, the affidavit of Mr. Steneck as Defendants' Exhibit 1, offered in evidence, and the affidavit of F. C. Rutz, Defendants' Exhibit 2, and the affidavit of R. R. Fauntleroy as Defendants' Exhibit 3.

The Court: All right.

Mr. Carter: Well, if your Honor please, may we further——

The Court: Who is handling this? One at a time here.

Mr. Carter: Judge Foster is, but I have the responsibility of these affidavits, and Mr. Wenner's train is late.

The Court: All right.

Mr. Carter: He is the fourth defendant. I was simply going to suggest that his affidavit be considered as offered now, and it will be filed as soon as he is here to sign it.

The Court: All right.

Mr. Foster: And the reporter will mark these exhibits in the way that I have indicated.

(Said affidavits were marked as above requested.)

Mr. Foster: We very much desire, your Honor, an opportunity to present to your Honor the authorities on this question, that a hear- [fol. 32] ing, and the discharge by the Commissioner was binding on the Court when the Court undertook to entertain a new proceeding. I am prepared to present the authorities, and I think the Government will be unable to produce any authority to the contrary to your Honor.

The Court: Proceed with your proof.

Mr. Carter: Now, if the Court please, I was the representative of the defendants of the group of counsel that appeared before your Honor in your chambers last Saturday when this matter was gone over before your Honor in the presence of Mr. Shale, and at that time the whole proceeding under discussion, as I understood it, was the question of whether, and how long we would be permitted to present our argument on the whole question, which your Honor will recall, stating on the original hearing, you stated you were not passing on, and would hear us at such length as we cared to be heard as to the whole proposition, and the authorities and so forth. Now then, on Saturday, it was my understanding, when we were discussing this whole question of Mr. Bogey appearing as a witness, that the matter of going into the merits, if your Honor decided on this hearing this morning that you would go into the question, would not be taken up at this time, and we have come prepared to be heard—your Honor said we could [fol. 33] at least have an hour to present the matter, and we have come prepared to present that in an orderly fashion at this time, and are not prepared to go ahead with the hearing.

The Court: Well, you have not got one of your clients here, on that affidavit matter. I am giving you leave to file it. There are some fundamental things here that I will not take all day on. I indicated that to you the other day very frankly. How long do you want now?

Mr. Carter: Well, we want sufficient time—in other words, our whole position——

The Court: All right, start now, go on.

Mr. Carter: Well, our position is——

The Court: Well, never mind, take it up in a lawyer like way.

Mr. Carter: That is what we are trying to do, if you will permit me.

The Court: You are not.

Mr. Shale: Your Honor, I would like to have an opportunity to tell you something about the nature of this proceeding.

The Court: I will pass on this proposition of these affidavits. Now, what have you got to say about the proposition whether the Court has a right to take this up de novo?

[fol. 33a] Mr. Shale: You mean what the Government has to say?

The Court: Yes.

Mr. Shale: If your Honor please, the Government relies on the case of U. S. vs. Haas, reported in the 167th Fed., at page 211. That was a decision by District Judge Holt, in the Southern District of New York, in May, 1906. In that case, the Commissioner discharged the defendant, and the Court said:

"Thereafter this application was made to me. The Government's counsel represented that an important and novel question of law was involved, and that, as no appeal by the Government was authorized from the decision of the Commissioner, it was desired to submit the question again for consideration.

"The defendant's counsel claims that the decision of Commissioner Ridgway should be held to be conclusive. He admits that such a decision is not technically res adjudicata, and the authorities so hold. The decision of a committing magistrate refusing to hold a prisoner

for trial or removal, like the grand jury's decision in refusing to find an indictment, is not res adjudicata and another application can be made upon the same facts."

The Court then cites some authorities in support of that proposition, and unless the Court desires to hear further from the Govern-
[fol. 33b] ment on that subject, I will not consume any more time. I consider that opinion to be conclusive on the question.

Mr. Foster: It is rather significant that counsel in reading from the Haas case should stop at the place that he did. I have the language before me which he quoted to your Honor, and he stopped at this point. This is what the court went on to say:

"But ordinarily, in the absence of special circumstances, the decision of any judicial officer having jurisdiction should be held to be conclusive on the same set of facts. In this application I sit"—that is, the Judge—"as a committing magistrate, with exactly similar jurisdiction as that of the Commissioner. The evidence submitted is precisely the same in both cases, and it would be entirely proper in this case to discharge the prisoner upon the ground that he has already been discharged by the judicial decision of another magistrate having concurrent jurisdiction."

That is the Haas case, and that is what that stands for, and if counsel wants to rely upon it, I am quite willing to rely upon it too. But there are other decisions, and this is the only case, your Honor,
[fol. 34] that he is able, with all his learnings and research and all the resources of the department back of him, to produce before your Honor, which he contends even sustains the unprecedented position which he takes.

The Court: Well now, as I understand it, this is a petition for removal.

Mr. Foster: De novo.

The Court: I understand. A hearing was held before a United States Commissioner, one of the United States Commissioners in this District. Before the Commissioner, and I suppose you have before me, as a petition, or one of the steps in the evidence was an indictment by a grand jury, a Federal grand jury in a Federal District, of course.

Mr. Foster: Yes.

The Court: Now, these proceedings here are removal proceedings that are sought to be had from a district, from this district, the Northern District of Illinois to what district?

Mr. Foster: To the Northern District of Ohio.

The Court: The Northern District of Ohio. Now, there is no question about the bona fideness of the indictment, that is that an indictment in due form—is there a certified copy of the indictment—
[fol. 35] Mr. Foster: The indictment was attached.

Mr. Shale: A certified copy of the indictment was attached to the complaint.

The Court: An indictment being duly found in the Northern District of Ohio.

Mr. Foster: There is no question that an indictment was returned.

The Court: And the face of the indictment charges a crime.
Mr. Foster: Of course we say it is insufficient.
The Court: I know, but on the face of it, it charges a crime.
Mr. Foster: Well, that is the Government's contention.
The Court: Well, I know, but is that the fact?
Mr. Foster: We do not admit that it sufficiently charges a crime.
The Court: Do you admit that there was an indictment?
Mr. Foster: Yes, your Honor.
The Court: Returned in the Northern District of Ohio?
Mr. Foster: Yes, your Honor.
The Court: All right.
Mr. Shale: And, if your Honor please, that indictment was demurred to by some of the defendants in that jurisdiction, and after elaborate argument and the submission of brief, the court took the [fol. 36] matter under advisement, and in due course handed down a written opinion in which he held that the indictment was unexceptionable both in substance and in form—I am using the words of the court,—and that if the allegations of the indictment were proved, all the defendants were guilty of a violation of section 1 of the Sherman Law.
The Court: Well, he overruled the motion to quash.
Mr. Shale: He overruled the demurrer and the motion to quash.
The Court: Is that the fact?
Mr. Foster: Pardon me?
The Court: Is that the fact?
Mr. Foster: I think that is the fact. On the other hand, the question before him was quite different from the question in a removal proceeding, where the indictment must be tested as to whether it is an affidavit sufficiently setting up facts, not merely conclusions of law. And, there are now pending in two districts a motion to exclude the indictment, or at any rate to disregard it, in a removal proceeding, and the court has taken it under advisement for a long period of time and has not yet decided it. That is the situation.
[fol. 37] Mr. Shale: If your Honor please, I do not see on what ground Judge Foster selects the question that the court may have under advisement. The Court may not have given any consideration to the cases at all; he may have had other matters on hand.
The Court: Well, that is not responsive. What I am trying to get at, gentlemen, the Court is sitting here absolutely trying to get the facts.
Mr. Foster: We wish to present them.
The Court: You do agree there was an indictment?
Mr. Foster: Yes, your Honor.
The Court: In the Northern District of Ohio.
Mr. Foster: Yes.
The Court: And you both agree that the indictment was attacked by demurrer, or motion to quash, whatever it may be called, and that the court, the sitting court in the Northern District of Ohio, where the indictment was returned, overruled the motion to quash, so hat in substance the Ohio courts sustained the validity of the indictment.
Mr. Foster: I think that is an accurate statement.

The Court: That is true. Now, you have before this Court, or you will have, in order to pass on this intelligently, you will have that indictment, won't you?

Mr. Foster: I assume that the Government will offer it.

The Court: Now, you have got certain affidavits here. What do they go to?

[fol. 38] Mr. Foster: These affidavits are on the preliminary question which we raised at the outset that this whole proceeding, having been heard before Commissioner Glass, and having a finding made, after a full and fair hearing, that in the absence,—just as in the language of the Haas case which counsel relies on—in the absence of some showing, of special circumstances such as fraud or arbitrary action on the part of Commissioner Glass, his conclusion, after a full and fair hearing, is conclusive. If it is not, it leads to this absurd situation: Your Honor, as you will readily recognize, sitting here as an examining magistrate in that regards, you are exercising exactly concurrent jurisdiction with the Commissioners of this court, the United States Commissioners, with any justice of the peace of the State of Illinois, with the Mayor of any city, or with any other magistrate of the state, having any jurisdiction to hold preliminary hearings. If the counsel for the Government can, after being defeated on a clear issue of fact as to whether or not there is probable cause, before Commissioner Glass, can come before your Honor, and without any showing of any improper conduct whatsoever on the part of Commissioner Glass, without even introducing before your Honor the record and the testimony, so that you know what testi-[fol. 39] mony Commissioner Glass heard, without assigning anything in the nature of error on the admission of evidence, or the exclusion of evidence before the Commissioner, if your Honor can now go ahead, as though your Honor was sitting upon appeal practically, and hear this in de novo, then I say to your Honor, any justice of the peace, after your Honor has heard this case, can likewise proceed to hear and overrule your Honor. They can continue this proceeding indefinitely.

The Court: Oh, I do not think that argument is well founded.

Mr. Foster: Why not?

The Court: Well, the bare statement of it is its own refutation.

Mr. Foster: Exactly, it shows the refutation, and it shows the unsoundness of the Government's position, because the Government can ostensibly keep on indefinitely, after one holding of lack of probable cause.

The Court: I disagree with you.

Mr. Foster: I beg your pardon.

The Court: I disagree with you.

Mr. Foster: There is not a case in this jurisdiction, and I do not believe any other that counsel is able to produce, and we have made inquiries which convince us that the practice in this district for [fol. 40] twenty-five years past, there never has been a case where a Commissioner, after a full and fair hearing on the merits of a situation presented to him on a question of probable cause, and has found lack of probable cause, that the Government has then proceeded de

novo before a United States judge, and I will ask counsel if he can cite a single instance where it has been done.

The Court: Well, you are arguing the matter.

Mr. Foster: Certainly.

The Court: Please give me something along your argument there that the court has not the power.

Mr. Foster: Exactly, that is what I am pleased to do; that is what I am prepared to do. In the first place, I cite to your Honor the Haas case which counsel himself refers to, which says specifically that ordinarily, and in the absence of any proof of special circumstances, that the decision of the Commissioner should be held conclusive on the court. It is exactly the situation that is here presented. There had been a finding by the Commissioner of lack of probable cause, and then in that particular case the Government sought to go before a Federal judge, and tried to get him held on a new de novo proceeding, and the court held that that was improper, and that the defendant could properly be discharged on that ground, and that was sufficient ground for his discharge.

I call your attention also to another case, in re Wood, 95 Federal [fol. 41] Reporter, 268. In that case, the first removal proceeding was before a commissioner, and then the Government, after a final discharge of the defendant, started a new proceeding before another commissioner. And, what did the court say in that case? This is the language of the court:

"Upon this application for removal, two questions are presented: First, as to the effect of the discharge by Commissioner McKee."

This had come up on habeas corpus before the court, and the court had before it the fact that there were two proceedings, first the discharge, and second a holding.

The Court: Does it say holding by the same commissioner or two different commissioners?

Mr. Foster: Two different commissioners.

"Second, as to the sufficiency of the showing made to authorize an order of removal.

"As to the first question, I am of the opinion that the action of the commissioner in an application of this kind, upon the full consideration of the testimony offered, and especially where such testimony is that upon which the indictment is found, should be final. It should not be open to the Government to file repeated petitions before different commissioners upon substantially the same state of facts. If for any reason"——

[fol. 42] The Court: Suppose it was a criminal case; suppose the Commissioner had discharged the defendant, and the defendant came before the grand jury?

Mr. Foster: You mean on a committing case in the jurisdiction?

The Court: Yes.

Mr. Foster: I think he probably could, yes, your Honor.

The Court: Well, is there any question about it?

Mr. Foster: No, I imagine not, I do not think there is. I have

not examined into the authorities, but I assume—that is a very different situation from this. There is one case, I think, in this jurisdiction where that did arise. Commissioner Mason once refused to hold a prisoner, and then they did go before the grand jury and have him indicted, and the indictment was naturally disposed of by the court when it was called to his attention that the commissioner had already ruled upon it. I am told that, I was not in the case.

The Court: I think there is no question about it.

Mr. Foster: But that is not this situation.

The Court: All right.

Mr. Foster: This is a question of a removal to a foreign jurisdiction.

The Court: You spoke about justices of the peace in the state court.

Mr. Foster: Yes.

[fol. 43] The Court: That is universal. If a committing magistrate would discharge a prisoner for any crime under the laws of the state of Illinois, there is no question but what he might be indicted by a grand jury.

Mr. Foster: I am inclined to think so.

The Court: There is no question about it.

Mr. Foster: I will quite agree with you. We are agreed upon that.

The Court: All right.

Mr. Foster: I say that is not this case. I have just read to your Honor the language from in re Wood, a Federal District Judge, in which he said that it should be final. He goes on to say——

The Court: Well, but that was a situation whereby there were two hearings with regard to some alleged crime, I take it.

Mr. Foster: Oh, no, it was a removal case, exactly like this.

The Court: Oh, a removal case.

Mr. Foster: Yes.

The Court: I did not understand.

Mr. Foster: I am citing removal cases.

The Court: I did not understand you. Pardon me.

Mr. Foster: Both of these cases are removal cases?

The Court: All right.

Mr. Foster: The Haas case, which counsel relies on, is identical with this situation. In that case the Commissioner had found lack [fol. 44] of probable cause, and then they went before the court on a removal proceeding, and the court said that it was sufficient that there had been a finding, and that he did not have to go on and look into the evidence. He did go on and say that he concurred entirely with the finding of the Commissioner.

Mr. Shale: What happened in the Supreme Court?

Mr. Foster: The Supreme Court did not pass on this question.

The Court: Did the Supreme Court pass on that particular case?

Mr. Shale: Surely, your Honor. That question went to the Supreme Court.

Mr. Foster: This question was not argued before the Supreme Court.

Mr. Shale: The Commissioner discharged the defendant, and the District Judge followed the action of the Commissioner.

The Court: In what report is it, have you got it?

Mr. Shale: Surely. I can give you the citation.

Mr. Foster: Well, I am sure it did not discuss this question. There are a great many of these Haas cases.

Mr. Shale: The 216th U. S., that is Haas vs. Henkel, that is the title of the case.

Mr. Foster: They did not discuss this question at all.

The Court: That was not this particular case in the Supreme Court?

[fol. 45] Mr. Shale: Surely.

Mr. Foster: I doubt it.

The Court: Let us see about that.

Mr. Shale: In that case, it took the Government five years to bring the defendant Haas——

The Court: Where is the case, let us see what it is, get it.

Mr. Foster: I know the case, but I did not know it was an appeal from this decision. I doubt whether it is. It did not deal with this situation anyway, it does not allude to it.

The Court: Let me take it, please.

(Decision handed to the Court.)

Mr. Foster: It does not seem to me it is the same situation, your Honor.

The Court: Where is this particular case, is this particular situation passed on?

Mr. Shale: You mean the question of res adjudicata?

The Court: Yes.

Mr. Shale: It is not mentioned in the case to the Supreme Court. Apparently the Court did not think it was worthy of devoting any attention to it.

The Court: This is the identical case that counsel referred to in the Court of Appeals?

Mr. Shale: Yes.

The Court: I see.

Mr. Foster: I think not, your Honor.

[fol. 46] Mr. Shale: That is my understanding.

Mr. Foster: I do not want to contradict counsel, but this case that your Honor has before you is a situation where the defense put up——

The Court: This settles it.

Mr. Foster: I do not think it is the same case at all.

The Court: It is an appeal from the Supreme Court of the United States for the Southern District of New York.

Mr. Shale: Your Honor, doesn't it show right under the syllabus, doesn't it give a reference to the 167th Fed., 211?

The Court: Yes, 167 Fed. Reporter 211.

Mr. Shale: And that is where we find the Haas case that we have been specifically discussing here.

The Court: Your reference now is to the 167th Federal.

Mr. Foster: Counsel for the Government has referred to it, yes, the case we have been talking about is the 167th Federal, and the Supreme Court affirmed in that case, I think—didn't the Supreme Court in that case affirm the lower court?

The Court: Yes, I think so.

Mr. Foster: Well, then, they held just the same as the court held here, and affirmed it; therefore it is a conclusive decision our way instead of for the counsel for the Government. I am glad he called our attention to it.

Mr. Shale: I do not think they did affirm it.

The Court: It says so here, that is all I know, "167 Federal Re-
[fol. 47] porter 211, affirmed."

Mr. Foster: Yes.

The Court: That is the way I understand it.

Mr. Shale: Well, I know this, that Haas was eventually removed to the District of Columbia, and tried.

The Court: Well, all I know is, under the syllabus there, the end of the syllabi, in fine print, "167 Federal, 211, affirmed."

Mr. Foster: Yes, "Affirmed", at the end, it says, "Final Order, affirmed." And I am perfectly willing to go into a discussion of the Haas case in the Supreme Court, but it don't bear on this question of res adjudicata in the finding of the commissioner at all, it don't allude to it, and I will take it up in due course in my argument.

The Court: All right.

Mr. Foster: I cited to your Honor two cases, in re Wood, and the Haas case which specifically both hold that in the absence of some special showing, which they do not make here at all—they have not attempted to make any, they have not even come forward and attempted to show that they want to introduce some evidence. Before the Commissioner, they were given every opportunity to introduce evidence, as the record would show if it were before your Honor; they specifically refused to introduce any before the Commissioner. The Commissioner offered to postpone the hearing for them, so that they could have all the time in the world. They said no, we don't want to
[fol. 48] introduce any more evidence, and they closed their case in that situation. Now, they have not made the slightest suggestion here of any special circumstances arising before the Commissioner that entitles them to a de novo hearing before your Honor.

Now, I call your Honor's attention to another case, not exactly this case, because this is an extradition case, but counsel for the Government is very fond of citing—no, I beg your pardon, this is not an extradition case, this particular one. I will refer to an extradition case in a moment. Counsel for the Government is very fond of citing this kind of a case. This is a case under the Chinese Exclusion Act, United States vs. Yung Chu Keng. I hope your Honor will pardon my pronunciation of the Chinese. It is the 140 Federal Reporter, 748. In that case, the court said:

"It is also agreed that the court may pass upon the single question whether, after a Chinese person charged with being unlawfully in

the United States has had a hearing regular in form before a United States Commissioner, and it has been adjudged by the Commissioner that such Chinese person is 'entitled to be and remain within the United States', and after the Commissioner has made an order discharging such person, he may again be apprehended and proceeded against upon complaint instituted in a District Court of the United [fol. 49] States in the district in which the Commissioner has exercised such authority as is just referred to."

And then the court says:

"I shall hold that he cannot be, where the proceeding before the Commissioner appears to have been regular, and a hearing has been had, and a decision regularly made. The ruling of the Commissioner may have been erroneous—that is, against the evidence or contrary to law; but, in the absence of some showing of broad or gross irregularity amounting to positive abuse, his judgment must be regarded as a determination of the issue.

"This conclusion is reached after considering that the proceeding to inquire into the status of a Chinese person charged with being unlawfully within the United States is intended to be summary in its character. The Commissioner has the same power and authority that the judge of this court would have in such an investigation. His function is that of a judicial officer, aiding to ascertain contested facts on which the aliens' right to be in the country has been made by Congress to depend."

And then they go and say that it is a judicial investigation. Of course, I do not need to cite authorities to your Honor to the effect that in a removal proceeding a Commissioner is exercising a judicial function. The books are full of such cases, and it is Horn book law. And they go on to say:

[fol. 50] "If, when a Chinese person is discharged by a United States Commissioner after a hearing, another complaint may be laid before a United District court or Judge, based upon the same facts, it is in effect a re-examination into the facts. If one re-examination may be had, why not several before different Commissioners? As shown, this cannot be had, where discretionary power is vested in an executive authority, unless authorized by statute; and by analogy, where, as in Chinese deportation cases, judicial aid is invoked to ascertain facts in aid of the exercise of political and executive measures, if it has been regularly pursued, I do not believe that another ascertainment is permissible, unless fraud or abuse is relied on."

Now, your Honor, you are familiar with the line of cases, I won't stop to cite them, where an executive officer makes a finding of fact. Take the Secretary of War finds that a certain bridge interferes with navigation. There are a long line of those cases. Every executive officer in Washington, I might say, or at any rate all the heads of the great departments have in some connection or other, under some law of Congress been required to give an authority to finding a fact, and it has been universally held by the Supreme Court of the United States in case after case when a fair hearing is had, if there is no arbitrary action on the part of the Secretary of War or other ex-

[fol. 51] ecutive official that the courts are precluded from going into an investigation of that fact, and that it is conclusive, and I imagine—I don't know that that was more or less involved in this last decision by the Supreme Court with reference to the Sanitary District here.

Now, here is a case where the Commissioner exercised a judicial function, of greater authority, one might say, than the executive. The Supreme Court in Tinsley vs. Treat, 205 U. S., the case that stands out in all the decisions of the Supreme Court of the United States as defining how these removal proceedings should be conducted, holds specifically that it is a judicial proceeding, and that it is a matter for the determination of the Commissioner in a proper judicial manner as to whether there is probable cause. Now, I referred to that case. I do not want at this time to spend the time reading extensively to your Honor excerpts from opinions. In that case of Tinsley vs. Treat, 205 U. S., at page 20, the Supreme Court, speaking through Chief Justice Fuller, reviewed all the decisions that had been rendered prior to that time on this vexed question of removal proceedings. And in that case, there was flatly presented to the Supreme Court and to the lower court on the habeas corpus proceeding which had been instituted by the defendant who had been held for removal [fol. 52] to another state, on a process just like this, there was clearly presented to the court the question whether or not it was error for the Commissioner hearing the case to exclude evidence offered by the defendant for the purpose of showing that he did not commit the offense charged in the indictment. The Government in that case, as in this, introduced the indictment, that is the regular indictment voted by a grand jury in another district of the United States, I think is was in Tennessee, and rested, and the case came up in Virginia, and in that case the Supreme Court, after reviewing all the earlier decisions held that it was error, reversible error for the Commissioner to exclude evidence, and based their position, not merely on statutory requirements, but on the constitution of the United States itself. The Supreme Court held that when a man is brought before an examining magistrate or United States Commissioner for removal to another district of the United States upon an indictment regularly returned by a grand jury in that other jurisdiction, that he has a constitutional right to present his evidence to that Commissioner for the purpose of rebutting the prima facie case made out by the indictment.

The Court: I do not think there is any question about that proposition.

[fol. 53] Mr. Foster: No, your Honor. Well, it seems to me so. And that case has been reaffirmed and reaffirmed down to the latest day, and still counsel for the Government before Commissioner Glass objected to our introducing any evidence, and tried to deprive us of constitutional rights which are ours under the decisions of the courts.

Now, what error is it they rely upon before Commissioner Glass that they seek to review his hearing? Here were hearings extending over a ten day period. The hearings went on straight on eight *on eight* different days. The Government put in its case by putting in

the indictment. The defendants called to the stand not merely the defendants themselves, but outside business men, customers who had been dealing with these different people for a period of years, and showed by overwhelming and compelling evidence that the allegations contained in the indictment were not well founded. I would defy any person to take the record made before Commissioner Glass and come to any conclusion other than the one come to in this case, that there was an absolute lack of probable cause. The Government was invited to put in evidence in rebuttal, every opportunity given them, but no, they did not do it. Now, on what plea do they come before your Honor and say we want a de novo hearing. They have got to make some showing, in the language of this case——

[fol. 54] The Court: I am passing on now the right of this court—you challenge the right of this court to hear this?

Mr. Foster: Yes, your Honor, without some showing that they have got to make that there was something wrong about Commissioner Glass' decision.

The Court: Well, all right, but confine yourself to that proposition.

Mr. Foster: Well, that is the proposition.

The Court: Well, I know, but you are confining yourself to the reason of the finding. I am now confining this to the right of this Court. You are diverting a little.

Mr. Foster: No, pardon me, your Honor. I say it is a condition precedent to the Government—they have come in here and made a motion for a de novo hearing. Counsel gets up and makes an opening which consists of an address of three minutes and he says that that is all he is going to present.

Mr. Shale: If your Honor please, the only reason I did not make an opening statement was because I did not have an opportunity to do so, and I am still waiting for one.

Mr. Foster: If counsel wants to proceed to show some reason why he can go ahead, why that is a different proposition.

The Court: Now, let us see. I have been waiting to hear you give [fol. 55] me some legal reason why I do not have this right. You still go into the equities, or the merits of the matter.

Mr. Foster: Oh no, pardon me. I say that I have given you in the first place three authorities.

The Court: That is all you have got?

Mr. Foster: No.

The Court: All right.

Mr. Foster: I do not quite get the point that your Honor makes, I will confess.

The Court: You have got a proposition here whether the court has got a right to hear it.

Mr. Foster: Well, I say, in the first place, in re Woods, says that this Court has not any right to hear it. That is one.

The Court: All right.

Mr. Foster: I say, in the next place, United States vs. Haas, says that this court has not any right to hear it. In the next place, I say in this analogous case on the Chinese exclusion act, that the court

says this court has not any right to go into that matter, without some showing, as a preliminary matter, that there is some fraud or abuse on the part of Commissioner Glass, which is not offered at all. In extradition cases, I say, when there has been a full and complete hearing on the merits, that the same rule obtains. If there has not been [fol. 56] any hearing, of course, that is a different matter. They are fond of citing Charleston vs. Kelly, as an authority, as they say, their way. I am willing to cite it as an authority to your Honor the other way, a decision of the Supreme Court in the 229th U. S. where the Supreme Court expressly said that there is not, and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person, and then say:

"Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed."

That is the language of the Supreme Court. I say that all of these cases hold conclusively, as I read them, and counsel has not cited a single authority to the contrary. The Haas case, instead of an authority his way, is exactly the reverse; that all of these cases hold that when a full and fair hearing has been had before one commissioner, official, I care not who he is, and the prisoner has been discharged on a removal proceeding, that then the Government cannot turn around and seek on the same facts to have a de novo hearing before another commissioner, or another court, it does not make any difference. The court and the commissioner are on a par in this matter, and the cases again and again have held that the jurisdiction is the same, and that is *is* merely concurrent.

[fol. 57] The Court: What have you got to say about that, Mr. Shale?

Mr. Shale: If the court please, I find that the case of Haas vs. Henkel in the Supreme Court of the United States held precisely what I stated it held in the first instance. We must look to the context to see what the word "Affirmed" at the bottom of the decision means, and I read from the decision:

"Upon the whole case we conclude that the Commissioner had jurisdiction, and that no sufficient reason is shown for discharging the appellant.

"Final order denying writ."

And the opinion by Justice Brewer, he said:

"I concur in affirming the orders of removal in these cases, but my concurrence must not be taken as holding that the indictment will stand the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, and as seems to be suggested by the opinion in number 367, I am of the opinion that such doubt should be settled by direct action in the court in

which the indictments were returned and not in removal proceedings."

Mr. Justice McKenna also concurred in the result, but reserved his opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States.

[fol. 58] Now, the Haas case before Judge Holt held that the decision of a commissioner is not res adjudicata. If anything could be plainer than that, I do not know what it is, and if it is not res adjudicata, some other court or some other commissioner has a right to pass upon it. It is similar to a grand jury proceeding. If one grand jury refused to vote a true bill, the same evidence can be presented to another grand jury, as your Honor well knows, and if that grand jury refuses to vote a true bill, it can be submitted to another one, just as long as the statute of limitations does not run.

This, if your Honor please, is a question of law. The question is, can a United States Commissioner nullify the action of a Federal grand jury, legally organized, made up of twenty-three men, a legally organized grand jury that had sufficient evidence presented to it to warrant it in returning an indictment, containing the allegations that are contained in this indictment. The action of the defendants in resisting removal to the Northern District of Ohio amounts to an obstruction of Justice. In that case, there are some thirty odd defendants residing——

The Court: Of course, I am not passing upon that. I am passing upon the right of this court to hear this question of removal.

[fol. 59] Mr. Shale: Well, we stand on the proposition that it is not res adjudicata. Two other judges, if the Court please, a judge for the Eastern District of Tennessee, where the Commissioner discharged the defendants, has agreed to hear this matter de novo, and Judge Hickenlopper for the Southern District of Ohio, another district in which the Commissioner discharged the defendants, will hear this matter de novo on January 31st.

Mr. Foster: There has not been any hearing at all. It is in exactly the same situation that is before his Honor, whether they shall hear it or not.

Mr. Shale: It is set for hearing.

Mr. Foster: They set it the same as his Honor set it for today, exactly the same situation.

The Court: I can settle this matter very quickly so far as I am concerned.

Mr. Shale: The government has nothing more to say on that subject.

The Court: It seems to me, the thing that you are losing sight of here is that these defendants are entitled to a day in court. They are entitled to a trial according to a regular form. Now, where is that trial? That trial is where the indictment is made, in the district of Ohio; no question about that. And any defenses are prop-

[fol. 60] erly there. Now, so far as the Commissioner is concerned, this is the fact, the Commissioner—I do not think that anybody will gainsay the proposition. The Commissioner is entitled to receive any evidence in his mind that might go to the question of prob-

able cause, no question about that. It is also fundamental, this indictment, properly certified, I think there is no question, is prima facie evidence. There is no question about that. Now, it seems to me the big thing that is misconceived in the whole hearing is that the Commissioner took upon himself the right to hear the case in its original inception. Now, he has got certain rights, but there is no question about this, the Government has got the same right to have this case heard just the same as the defendants have, and they have got a forum in which that must be determined, and all reasonable intendments, matters of common sense must be accomplished. It seems to me that this is purely technical, and the motion is overruled, and exception. Now, when do you want to proceed on the merits?

Mr. Lutkin: Now, if the Court please, I represent one of the defendants, Mr. Steneck here, and whereas I wish to add nothing on the point that has already been raised, I wish to present to your Honor this question in order that our record may be perfectly clear. We sought here to introduce affidavit to make a proper showing in this record that there had been a hearing before Commissioner Glass, [fol. 61] and as the record now stands it is barren of any such showing, except such things as may have been taken for granted in the argument, of which your Honor may have spoken, of things which were taken for granted in the argument. We have nothing in the record of that effect.

The Court: I understand certain affidavits were filed.

Mr. Lutkin: You denied our right to file them.

The Court: You may preserve your rights as to that. I do not think they are pertinent, but you may file them.

Mr. Foster: Sure.

The Court: So that you have got your record, and then a motion to strike.

Mr. Foster: All right.

The Court: So that you have got your record.

Mr. Foster: Then we file as Defendants' Exhibit 1 the affidavit of J. R. Steneck, respondent, as Defendants' Exhibit to the affidavit of F. C. Rutz, respondent, and as Defendants' Exhibit 3 the affidavit of R. R. Fauntleroy, respondent, and as Defendants' Exhibit 4, the affidavit of Harry C. Wanner, respondent, the last one is not marked, and I will ask the reported to mark it.

Mr. Carter: He has been in now about an hour.

The Court: Whatever it is, it may be filed.

Mr. Foster: I have it here. He has came in.

[fol. 62] The Court: These affidavits are to the question of the right of the Court to hear this proceeding, and of course you object to the introduction of the affidavits.

Mr. Shale: I do not understand they were as to the right of the court.

The Court: I will allow them to be filed. I want to get it in the record. You make a motion to strike, or whatever may be necessary, to preserve their rights, as well as yours, that is what I am trying to get at. You get my point.

Mr. Foster: We have offered them in evidence; they have been admitted.

Mr. Shale: And we have objected to them on the ground that they are irrelevant and incompetent in a proceeding de novo.

The Court: A motion to strike is sustained, to strike the affidavits. Of course they are in the record, and exception to that.

Mr. Foster: Exception to the ruling of the Court in striking the affidavits, on behalf of each and every one of the four defendants.

The Court: Sure, that preserves all your rights. Now, when do you want to hear this?

Mr. Shale: If your Honor please, the Government has not rested yet, and just before resting, I would like to inquire whether the identity of the four defendants are admitted.

[fol. 63] Mr. Foster: We have not begun the hearing.

Mr. Shale: Yes, we have.

The Court: What is that?

Mr. Foster: I did not understand he had begun his hearing. We have offered these affidavits on the preliminary question, and your Honor has stricken them.

The Court: On the question of the right of the Court to hear it, that is what I understood.

Mr. Foster: Certainly, yes, your Honor, that is my understanding.

Mr. Shale: I thought your Honor had decided that you would hear it.

Mr. Foster: He has.

The Court: Yes.

Mr. Shale: And you asked us when we would proceed.

Mr. Foster: Yes.

Mr. Shale: With the proof.

The Court: You and I and Mr. Carter had a talk Saturday, wasn't it, wherein I said I would not force you to go ahead on the merits of the controversy today.

Mr. Carter: Yes, today.

The Court: But fix it at some convenient day very soon.

Mr. Carter: That was right.

Mr. Shale: Can't the Government put its case in? We can put [fol. 64] it in, in the next three minutes. We would like to proceed to the point of resting in this case, if the Court please.

The Court: Well, of course, I do not know, it does not seem you ought to be precluded, but I sort of am—of course, I did not make it final or anything, just a matter between counsel and the court there that I would give you some other day very soon.

Mr. Foster: Yes sir.

The Court: As soon as convenient.

Mr. Shale: My understanding was that you would give them an opportunity to rebut the Government's case, and the Government's case is not yet in.

The Court: Of course, I do not know what they are going to do.

Mr. Shale: And we desire to put the Government's case in, and can do it in two or three minutes.

The Court: What day did I tell you, Mr. Carter, that I thought I could take it up?

Mr. Carter: I told your Honor, if you will recall, that I had a

Board meeting set for tomorrow, and I understood it would be any time after Wednesday, that suited your Honor's convenience.

The Court: How about you, Mr. Shale?

Mr. Shale: There are four of us here from Washington, we had as-
[fol. 65] sumed that this matter would start today and proceed to an early conclusion. We had hoped that, to say the least.

The Court: I have lots of hopes that are not realized.

Mr. Shale: So have I.

The Court: What is the earliest day, gentlemen, that you want?

Mr. Carter: I have a very important directors' meeting tomorrow.

Mr. Shale: They have got a half dozen lawyers on the other side, and might progress, without Mr. Carter.

The Court: Oh, they all want to be heard. The court will give them a chance.

Mr. Shale: Well, one directors' meeting is not going to postpone it indefinitely.

The Court: No, no.

Mr. Carter: I said after Wednesday, I said Wednesday or after. I corrected myself.

The Court: I think I will take it up Saturday.

Mr. Foster: Ten o'clock, your Honor?

The Court: Well, I have got a number of motions, probably not just ten, but I think I will take it up Saturday.

Mr. Lutkin: Judge Cliffe, I hate to even say a word about that, but I have got a motion to argue in Milwaukee on Saturday morning, I am sorry.

The Court: Well, if you don't tell me, I won't know. I do not want to put it at sometime when counsel cannot be here. Let us say on Friday.

[fol. 66] Mr. Shale: Can't you possibly hear this Wednesday? There are four of us here from Washington who have to wait around all week.

The Court: We have all kinds of trouble once in awhile.

Mr. Lutkin: Well, your Honor——

The Court: No, wait a minute.

Mr. Shale: And then we will be right on the threshold of a similar proceeding in another court.

The Court: Well, I will have to disarrange my entire calendar here, but I will try to hear it Wednesday afternoon. I will try to make some arrangements for Wednesday afternoon, that is the 14th.

Mr. Shale: At what time?

The Court: Two o'clock, commencing at two.

Mr. Shale: Counsel for the Government appreciates that very much, your Honor.

The Court: That is all right. It is only a question of arranging it, that is all.

(Whereupon the further hearing of the above matter was continued to Wednesday, January 14th, 1925, at two o'clock P. M.)

(Endorsed:) Filed Jan. 14, 1925. John H. R. Jamar, Clerk.

[fol. 67] Previous to the filing of the Petition, and on the 12th day of January, 1925, there was filed in the Criminal Docket of said Court in the Clerk's office the following Affidavit of F. C. Rutz:

[fol. 68] EXHIBIT TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. —

UNITED STATES OF AMERICA

vs.

NATIONAL MALLEABLE AND STEEL CASTINGS COMPANY et al., F. C. RUTZ, R. R. FAUNTLEROY, J. R. STENECK, HARRY C. WANNER

Application for Removal before the Honorable Adam C. Cliffe, a Judge of said Court

Affidavit of F. C. Rutz, Respondent

STATE OF ILLINOIS,
County of Cook, ss:

F. C. Rutz, being duly sworn, on oath deposes and says that on, to-wit, the 2nd day of December, 1924, a certain complaint was filed before the Honorable James R. Glass, United States Commissioner for said District, a copy of which is hereto attached, marked Exhibit "A", in and by which it was represented that a certain indictment had been returned on or about the 27th day of March, A. D. 1924, in the Eastern Division of the Northern District of Ohio charging this affiant and others with having engaged in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings in violation of an act of Congress of July 2, 1890, known as the Sherman anti-trust law, and it was prayed that this affiant and certain other individuals in said complaint named might be apprehended and further dealt with according to [fol. 69] law; that thereafter on said 2nd day of December this affiant appeared before said United States Commissioner and gave bond to appear before said Commissioner in the removal proceedings begun by the filing of the aforesaid complaint, and thereafter this affiant did so appear and hearings were had on the 11th, 15th, 16th, 17th, 18th, 19th and 20th days of December, 1924, at which hearings Mr. Roger Shale, Special Assistant to the Attorney General of the United States, and Mr. James G. Cotter, Assistant United States Attorney at Chicago, appeared on behalf of the United States, and this affiant and the other individuals whose removal was sought by the Government were represented by Messrs. Butler Lamb Foster & Pope and Messrs. Alden, Latham & Young; that at said hearings the United States introduced in evidence a certified copy of the

aforesaid indictment returned in the Eastern Division of the Northern District of Ohio, and this affiant and the other said individuals whose removal was sought, introduced evidence consisting of the testimony of witnesses, including this affiant and said individuals, who were examined by their counsel and cross-examined by counsel for the United States, and certain documentary evidence; that thereafter the counsel for the United States announced that they did not desire to put in any evidence in rebuttal, although opportunity was afforded them so to do by the Commissioner; that thereupon the evidence was closed, and after arguments by counsel for the Government and counsel for this affiant and said other individuals, said Commissioner entered an order discharging this affiant and said individuals, and rendered an opinion, copy of which is hereto attached marked Exhibit "B".

F. C. Ruty.

Subscribed and sworn to before me this 12th day of January, 1925. M. M. Morse, Notary Public. (Seal.)

[fol. 70] EXHIBIT "A"

IN THE UNITED STATES OF AMERICA

SEVENTH CIRCUIT,
Northern District of Illinois,
Eastern Division, ss:

On this 2nd day of December, A. D. 1924, at the City of Chicago in the Eastern Division of the Northern District of Illinois, before James R. Glass, a United States Commissioner for said district, comes James D. Rooney, Spl. Agt. B. O. I. of the said United States, of Chicago, aforesaid and upon his oath, complains and says that R. R. Fauntleroy, F. C. Rutz, John T. Llewellyn, and J. R. Steneck, late of the same City, on or about the 27th day of March, A. D. 1924, at —— aforesaid, in the eastern division and northern district of Ohio unlawfully did engage in an unlawful combination in restraint of interstate trade and commerce in malleable iron castings, in violation of Act of Congress of July 2nd, 1890, known as the Sherman Anti-Trust Law, as more fully set forth in certified copy of indictment returned March 27th, 1924, in the District Court of the United States of America, for the Northern District of Ohio, Eastern Division, entitled, United States of America, vs. National Malleable and Steel Castings Company, et al., on file in my office and made a part hereof, contrary to the form of the statute in such case made and provided.

Wherefore, this complainant prays that the said R. R. Fauntleroy, F. C. Rutz, John T. Llewellyn, and J. R. Steneck may be apprehended and further dealt with, according to law.

James D. Rooney.

Subscribed and sworn to before me by the above named James D. Rooney the day and year above written. James R. Glass, U. S. Commissioner.

(NOTE.—Exhibit "B" will be found as Exhibit B to the petition for writ of habeas corpus and certiorari, above.)

(Endorsed:) Filed Jan. 12, 1925. John H. R. Jamar, Clerk.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING WRIT OF HABEAS CORPUS AND CERTIORARI—January 14, 1925

This cause coming on to be heard on the petition of F. C. Rutz for a writ of Habeas Corpus and the court having read and considered said petition and being now fully advised in the premises,

It is ordered, that a writ of Habeas Corpus issue as prayed in said petition and that the hearing on said writ be set on the 22nd day of January, 1925, and that the said F. C. Rutz be admitted to bail pending said hearing, in the sum of Five Thousand Dollars ($5,000), with surety to be approved by the Clerk of the Court.

It is further ordered, that a writ of certiorari issue directed to James R. Glass, United States Commissioner at Chicago, Illinois, directing him to certify to this Court on or before the 22 day of January, 1925, the record of the proceedings had before him under and by virtue of a certain complaint filed on or about December 2, 1925, by the United States Attorney in and for the Northern District of Illinois, in the office of said James R. Glass, purporting to charge the said F. C. Rutz with the commission of a violation of the Act of Congress approved July 2, 1890, entitled: "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

Dated this 14th day of January, 1925.

Evan A. Evans, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS PETITIONS FOR WRITS OF HABEAS CORPUS, ETC.—Filed January 22, 1925

To the honorable judges of said court:

Now comes Edwin A. Olson, United States Attorney for the Northern District of Illinois, Eastern Division, and moves the court for an order (1) dismissing the petitions herein for writs of habeas cor-

pus and certiorari, (2) vacating the writs upon said petitions granted, and (3) remanding said petitioners to the custody of the United States Marshal for the Northern District of Illinois, for detention under the warrants heretofore issued on January 14, 1925, by the Honorable Adam C. Cliffe, one of the judges of this court, issued as prayed in the complaint upon removal marked Exhibit C to the petitions herein; and for grounds therefor respectfully shows:

1. That the writs of habeas corpus herein were granted upon petitions addressed to and filed in the District Court of the United States for this district by the Honorable Evan A. Evans, one of the judges of the Circuit Court of Appeals for the Seventh Circuit, acting as a judge of said Circuit Court of Appeals and not under a designation [fol. 73] and appointment to hold a session of the District Court of the United States for this district, nor to otherwise act as or exercise the jurisdiction of a judge of said District Court; nor were said writs of habeas corpus granted for the purpose of exercising any independent and substantive jurisdiction of the said Circuit Court of Appeals.

2. The grounds upon which said writs were granted, as recited in said petitions, have been considered and adjudged adversely to petitioners by the District Court of the United States for this District; and said writs were sought and obtained in the midst of proceedings sub judice solely to serve as writs of error to summarily and prematurely review the validity of the action of said District Court in holding that a discharge of petitioners by James R. Glass, a United States Commissioner for this district, upon a hearing before him for removal of said petitioners to the Northern District of Ohio to be tried upon an indictment against them there pending is not res adjudicata and does not preclude hearing upon nor order of removal of said petitioners by it.

Edwin A. Olsen, United States Attorney.

Chicago, this 22d day of January, 1925.

[File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN OF ROBERT R. LEVY, UNITED STATES MARSHAL, TO WRITS OF HABEAS CORPUS—Filed January 22, 1925

To the honorable judges of said court:

1. I, Robert R. Levy, United States Marshal for the Northern District of Illinois, Eastern Division, do hereby make the following return to the writs of habeas corpus granted herein on the 14th day

of January, 1925, requiring me to produce the bodies of said petitioners before this Honorable Court, and to make return of the time and cause of their imprisonment and detention, and of my doings in the premises.

2. The petitioners were taken into custody by me on the 14th day of January, 1925, under warrants issued to me by Honorable Adam C. Cliffe, one of the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, dated January 15, 1925, a representative copy of which warrants is annexed hereto and marked "Exhibit A." Said warrants were issued in pursuance to a complaint in behalf of the United States, praying that said defendants be apprehended for removal to the Northern District of Ohio, for trial in the United States District Court at [fol. 74½] Cleveland, upon an indictment there pending against them, a copy of which is annexed to the several petitions of said petitioners and marked "Exhibit A" herein.

3. Said petitioners were apprehended by me, brought before the said Honorable Adam C. Cliffe, Judge of the United States District Court for this district, and, at the time said writs of habeas corpus were served upon me, said defendants were being held pending a hearing upon said complaint, for removal.

4. Upon the granting of the aforesaid writs of habeas corpus, petitioners were admitted to bail pending return thereof.

Wherefore, respondent prays that said writs of habeas corpus may be discharged, and that the said petitioners be remanded to his custody to be dealt with according to law.

Robert R. Levy, United States Marshal for the Northern District of Illinois, Eastern Division, by Sam Howard, Chief Deputy.

Dated at Chicago, Illinois, this 22 day of Japuary, 1925.

NORTHERN DISTRICT OF ILLINOIS, ss:

Sam Howard being first duly sworn, says that he is Chief Deputy United States Marshal, for the Northern District of Illinois, Eastern Division; that the foregoing return is true to his knowledge.

Sam Howard.

Subscribed and sworn to before me the 22nd day of January, A. D. 1925. Edward J. Kerrity. (Notarial Seal.)

[fol. 75] Ex. A.

The President of the United States of America to the Marshal of the Northern District of Illinois, Greeting:

You are hereby commanded that you take F. C. Rutz, if he shall be found in your district, and him safely keep, so that you have his body forthwith before the Judge of the District Court of the said United States for the Northern District of Illinois, at Chicago, in the Eastern Division of the said District, to answer unto the said United States on the complaint of one Thomas F. Mullen, under oath, charging that the said F. C. Rutz, beginning on January 1, 1917, and continuing to and including the 27th day of March 1924, did engage in a combination in restraint of trade and commerce in malleable iron castings, in violation of the Sherman Anti-Trust Act, which said offence is more particularly described and set forth in the indictment in said cause returned and duly filed on March 27, 1924, in the District Court of the United States for the Northern District of Ohio, Eastern Division, a certified copy of which said indictment is filed with and made a part of the complaint for this warrant.

And have you then and there this writ, with your return hereon.

Witness the Hon. Adam C. Cliffe, Judge of the District Court of the United States of America, for the Northern District of Illinois, at Chicago, aforesaid, this 14th day of January, in the year of our Lord nineteen hundred and twenty-five, and in the 149th year of the Independence of the said United States.

John H. R. Jamar, Clerk.

[fol. 76] (Back:) General No. 4991. No. 13097 W. D. 52072, District Court of the Unite d States, Northern District of Illinois. United States of America vs. National Malleable and Steel Castings Company et al. Bench Warrant. Returnable forthwith. John H. R. Jamar, Clerk. Returned and filed this — day of ——, A. D. 192-. —— ——, Clerk.

[File endorsement omitted.]

[fol. 77] In United States District Court

[Title omitted]

Opinion—Filed February 2, 1925

The four petitioners herein, Steneck, Rutz, Wanner and Fauntleroy, were, on March 27, 1924, indicted, along with some ninety others, and charged with a violation of the Sherman Anti-Trust Act.

Certain defendants were arrested or appeared and filed demurrers or motions to quash and challenged the sufficiency of the indictment.

A decision, favorable to the Government on this issue, followed, whereupon the Government has since sought to remove the individual defendants, who reside in many States other than Ohio, the place of trial. The individual defendants (including petitioners) have opposed such removal proceedings, and this writ of habeas corpus is prosecuted to prevent further effort on the part of the Government to remove petitioners from Illinois. Both parties recognize the right to remove exists under Section 1014 R. S.

The Government first sought to remove petitioners by applying to Court Commissioner Glass of this District. He found against the Government and dismissed the proceedings. The Government then instituted proceedings before Judge Cliffe and while such proceedings were so pending, but before a hearing, petitioners secured the issuance of this writ of habeas corpus upon the ground that the proceedings before the Court Commissioner were final and a bar to another application in the same action.

[fol. 78] The object of the statute is so obvious that it is hardly necessary to state it.

One accused of crime is entitled to a trial in the district wherein the offense was committed. The Government cannot, and should not be permitted to, force an accused to trial in a district far removed from the scene of the alleged offense. Likewise, one who commits an offense against the Government should not be permitted to escape the consequences of his criminal misconduct by moving to another State and defying the prosecution. To meet this situation, Section 1014 was enacted. By it, a procedure was outlined, whereby one accused of crime might be removed to the place of trial, which was also the place where the crime was committed.

Such difficulties as have arisen over the application of this statute are due to the fact that offenses today may, and often do, involve a large number of individuals, who reside in different and remote parts of the United States. In some of these crimes, the prosecution may be conducted in one of several judicial districts, because the offense is in fact committed in different districts. This is particularly true of such offenses as conspiracy, schemes to defraud and the use of the mails in furtherance thereof, and violations of the Anti-Trust Act. If the defendants named in the indictment be numerous and they reside in various districts, oppositions to removal may be successfully used as dilatory tactics. They may greatly delay the criminal prosecution. This result is more readily accomplished when the Court Commissioner misconceives his duties and sits as a trier of guilt and a reviewing court to pass upon the decisions and rulings of the court wherein the case is pending.

[fol. 79] The Court Commissioner should only pass upon the issue of probable cause. The Government is not required to prove defendant's guilt to the satifaction of each and every commissioner who may be asked to direct the removal of the accused. The Court Commissioner is not to review the evidence upon which the grand jury acted and set his judgment against the finding of the body created by law to vote and return indictments. He should ascertain whether the individual before him is one of the defendants named

in the indictment, and the Government must convince him that there is probable cause to believe such defendant is guilty of the offense charged in the indictment. Tinsley v. Treat, 205 U. S. 20. This probable cause is ordinarily established by the indictment, and when an indictment is presented the burden shifts to the defendant to overcome the prima facie case thus disclosed. In fact, it is more than a mere prima facie case. It requires a strong case on the part of the accused to justify a finding of no probable cause.

But further discussion of the duties of the Commissioner is beside the controversy. The question presented is a very narrow one. The foregoing statement serves merely as a back-ground to assist in determining whether the Commissioner's action in finding a want of probable cause is conclusive or a bar to a similar proceeding before the judge. That the Court Commissioner's action is not res adjudicata must be conceded. In fact, it is not so contended by petitioners. In their brief, it is said:

"We contend that even if the former adjudication can not be pleaded as res adjudicata in the technical sense, there are other rules of law which prevent the Government from re-arresting and retrying, without reference to the propriety of the action in the first tribunal, defendants who have already been discharged, in the first proceeding. In applying, therefore, for a hearing de novo, without attempting to show any error upon the part of Commissioner Glass or the existence of new evidence the Government is in fact claiming the right to re-try an issue which has already been litigated and rightly decided."

[fol. 80] Throughout the brief there are references to "res adjudicata in the technical sense" and "not technically res adjudicata,"—refinement of distinctions being made which, I confess, I do not appreciate. If the determination by Court Commissioner Glass is not res adjudicata, then what authority is there for the writ of habeas corpus to prevent Judge Cliffe from hearing the matter? There is not the slightest suggestion that the judge before whom the present application is pending will not give to the decision of the Court Commissioner such weight as it deserves. Yet by this writ of habeas corpus it is sought to deny to Judge Cliffe the right to hear the removal proceedings and such position cannot be sustained by questioning whether he will give to the Court Commissioner's finding such weight as petitioners believe it is entitled to receive. Conceding the right to a hearing under any circumstance, the foundation upon which the habeas corpus proceedings were instituted crumbles.

A decision is res adjudicata only when certain facts exist. Those facts are so decidedly absent here as to dispense with any discussion of them. Analogous situations likewise need not be cited to show that the ruling of the Commissioner is not res adjudicata upon this issue of probable cause. One case, United States v. Haas, 167 Fed. 211 (decision by Judge Holt, May 9, 1906), justifies special reference. The court there said:

"The defendant's counsel claims that the decision of Commissioner Ridgway should be held to be conclusive. He admits that such a decision is not technically res adjudicata, and the authorities so hold. The decision of a committing magistrate refusing to hold a prisoner for trial or removal, like the grand jury's decision in refusing to find an indictment, is not res adjudicata, and another application can be made upon the same facts. In re Martin, 5 Blach. 307, Fed. Cas. No. 9, 151; Cooley's Const. Lim. 404; 1 Bish. New Crim. Law, Sec. 1014, par. 2; Com. v. Hamilton, 129 Mass. 479."

It is not necessary to stress other objections to this procedure by writ of habeas corpus. The petition before Judge Cliffe did not [fol. 81] even disclose the prior proceedings before Commissioner Glass. The Judge, therefore, was clearly authorized to proceed with the hearing. He was not permitted to do so because this writ of habeas corpus was secured. It is difficult to escape the conclusion that this proceeding was for the purpose of delay, and such practices should be condemned. I have, however, investigated the legal question and expressed these views to facilitate, if possible, the final disposition of the matter.

The motion to quash the writ of habeas corpus is granted. Let an order be entered accordingly.

Evan A. Evans, Acting District Judge.

Jan. 31, 1925.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION TO QUASH—February 2, 1925

This cause having heretofore come on to be heard upon the motion to quash the Writ of Habeas Corpus, and the Court having considered and being now fully advised in the premises,

It is ordered that said motion to quash the Writ of Habeas Corpus be and it is hereby granted, and the Relator is hereby remanded to the custody of Robert R. Levy, United States Marshal.

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 2, 1925

Now comes the above-named F. C. Rutz, petitioner in the above-entitled cause, by Butler, Lamb, Foster & Pope, his attorneys, and considering himself aggrieved by the order and judgment made and

entered in the above-entitled cause on the 2nd day of February, 1925, does hereby appeal from said order and judgment to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Butler, Lamb, Foster & Pope, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 83½] And on, the samed day, to-wit, the 2nd day of February, 1925, came the Petitioner, by his attorneys, and filed in the office of the clerk of said court his certain Assignment of Errors in words and figures as follows: to-wit:

]fol. 84[IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed February 2, 1925

Now comes the above-named F. C. Rutz, petitioner in the above-entitled cause, by Butler, Lamb, Foster & Pope, his attorneys, and files herewith his petition for appeal to the Supreme Court of the United States from the order and judgment made and entered in the above-entitled cause on the 2nd day of February, 1925, and shows as his assignment of errors on which he relies to reverse said order and judgment, that in the record and proceedings in said cause and in the said order and judgment, there is manifest error in this, to-wit:

1. Said District Court erred in failing and refusing to hold that the detention of said F. C. Rutz by said Robert R. Levy, United States Marshal, under the warrant of arrest issued January 14, 1925, was in violation of Section 2, Article III, of the Constitution of the United States in that such warrant of arrest was issued in a second and de novo proceeding instituted before Honorable Adam C. Cliffe, Judge of the Northern District of Illinois, for the removal of said F. C. Rutz to the Northern District of Ohio, Eastern Division, there to be tried for an offense under the Act of Congress approved [fol. 85] July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" purported to be charged in a certain indictment, although said F. C. Rutz had been theretofore on December 20, 1924, discharged in the prior and similar proceeding instituted December 2, 1924, before United States Commissioner Glass of said Northern District of Illinois for the removal of said F. C. Rutz to said Northern District of Ohio, to be tried for the same offense under the same indictment, in which last-mentioned proceeding said Commissioner Glass in discharging said F. C. Rutz on December 20, 1924, had found after a full hearing

of the parties, that there was no probable cause to believe that said F. C. Rutz had committed such offense in said Northern District of Ohio, and although there was no showing made before said Judge Cliffe in said de novo proceeding, that there had been any fraud, bias, error, or any impropriety whatsoever in said prior proceeding before Commissioner Glass or in the discharge of said F. C. Rutz thereunder, or that the Government proposed or intended to offer or introduce in said second or de novo proceeding any evidence of probable cause in addition to or other than the evidence offered in said first proceeding.

2. Said District Court erred in failing and refusing to hold that the detention of said F. C. Rutz by said Robert R. Levy, United State Marshal, under the warrant of arrest issued January 14, 1925, was in violation of the Sixth Amendment to the Constitution of the United States, in that such warrant of arrest was issued in a second and de novo proceeding for the removal of F. C. Rutz to the Northern District of Ohio, Eastern Division, there to be tried for an offense under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints [fol. 86] and Monopolies," purported to be charged in a certain indictment although said F. C. Rutz had been theretofore on December 20,1924,discharged in the prior and similar proceeding instituted December 2, 1924, before said United States Commissioner Glass of said Northern District of Illinois for the removal of said F. C. Rutz to said Northern District of Ohio, to be tried for the same offense under the same indictment, in which last-mentioned proceeding said Commissioner Glass in discharging said F. C. Rutz on December 20, 1924, had found, after a full hearing of the parties, that there was no probable cause to believe that said F. C. Rutz had committed such offense in said Northern District of Ohio, and although there was no showing made before said Judge Cliffe in said de novo proceeding that there had been any fraud, bias, error, or any impropriety whatsoever in said prior proceeding before Commissioner Glass or in the discharge of said F. C. Rutz thereunder, or that the Government proposed or intended to offer or introduce in said second or de novo proceeding any evidence of probable cause in addition to or other than the evidence offered in said first proceeding.

3. Said District Court erred in failing and refusing to hold that the detention of said F. C. Rutz by said Robert R. Levy, United States Marshal, under the warrant of arrest issued January 14, 1925, in such second and de novo removal proceeding was in violation of the Fifth Amendment to the Constitution of the United States in that such detention of said F. C. Rutz, under the circumstances described in the preceding paragraph, deprived said F. C. Rutz of his liberty with said Petition for Appeal,

[fol. 87] 4. Said District Court erred in failing and refusing to hold that the detention of said F. C. Rutz by said Robert R. Levy, United States Marshal, under the warrant of arrest issued January

14, 1925, in such second and de novo removal proceeding was in violation of the constitutional rights of said F. C. Rutz in that such warrant was issued subsequent to and in disregard of a judicial determination that there was no probable cause to believe that said F. C. Rutz was guilty of the same offense purported to be charged in the complaint under which said warrant was issued.

5. Said District Court erred in failing and refusing to hold that there was no law authorizing the institution of such second removal proceeding against said F. C. Rutz in view of his prior discharge after a full hearing under a complaint based upon the same alleged offense and the same indictment upon which the second removal proceeding was based.

6. Said District Court erred in failing and refusing to hold that said second proceeding for the removal of said F. C. Rutz was unwarranted by law.

7. Said District Court erred in quashing the writ of habeas corpus.

Butler, Lamb, Foster & Pope, Counsel for Petitioner.

[File endorsement omitted.]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 2, 1925

The Petition for Appeal to the Supreme Court of the United States coming on to be heard this 2nd day of February, 1925, and the Assignment of Errors filed in said cause being presented to the Court with said Petition for Appeal.

It is ordered that the said appeal be allowed as prayed for, and that the bail bond in the sum of $5,000 heretofore filed by the petitioner in this Court stand pending the final determination of this appeal, or until the Supreme Court otherwise direct, the appeal to operate as a supersedeas. Cost bond on appeal is hereby fixed in the sum of $250.

Evan A. Evans, Judge.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed February 24, 1925

It is hereby stipulated and agreed by and between counsel for the respective parties in the above-entitled cause that the following portions of the record shall constitute the transcript of record on appeal to the Supreme Court of the United States.

1. Petition for writ of habeas corpus and certiorari, including:
Exhibit A. Indictment found in the Northern District of Ohio, Eastern Division, February term, 1924;
Exhibit B. Opinion of Commissioner James R. Glass rendered December 20, 1924, at termination of removal proceedings;
Exhibit C. Complaint filed before District Judge Adam C. Cliffe December 24, 1924, for removal hearing de novo.
Exhibit D. Transcript of proceedings before Judge Adam C. Cliffe January 12, 1925, including affidavit of F. C. Rutz of proceedings before Commissioner James R. Glass stricken out by Judge Adam C. Cliffe.
[fol. 90] 2. (a) Order of Honorable Evan A. Evans, sitting as Judge of the District Court of the Northern District of Illinois, Eastern Division, issuing writ of habeas corpus and setting date for hearing, dated January 14, 1925;
(b) Writ of certiorari directed to Commissioner James R. Glass to certify transcript of proceedings before him, dated January 14, 1925.
3. Motion to dismiss writ of habeas corpus, dated January 22, 1925.
4. Marshal's return dated January 22, 1925.
5. Order of Judge Evan A. Evans dismissing writ of habeas corpus, dated February 2, 1925.
6. Opinion of Judge Evan A. Evans rendered February 2, 1925.
7. Petition for appeal.
8. Petitioner's assignment of errors on appeal.
9. Order allowing appeal and fixing appeal bond, dated February 2, 1925.
10. Præcipe for record.
11. This stipulation.

Dated Chicago, Illinois, February —, 1925.

Butler, Lamb, Foster & Pope, Attorneys for Appellant. Edwin A. Olson, Assistant United States Attorney, Attorney for Appellee.

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 24, 1925

To the Clerk of the District Court of the United States.

SIR:

Please prepare the transcript of record for the appeal in the above entitled cause to the Supreme Court of the United States and incorporate in said transcript the following documents:

1. Petition for writ of habeas corpus and certiorari, including:
Exhibit A. Indictment found in the Northern District of Ohio, Eastern Division, February term, 1924:
Exhibit B. Opinion of Commissioner James R. Glass rendered December 20, 1924, at termination of removal proceedings.
Exhibit C. Complaint filed before District Judge Adam C. Cliffe December 24, 1924, for removal hearing de novo:
Exhibit D. Transcript of proceedings before Judge Adam C. Cliffe January 12, 1925, including affidavit of F. C. Rutz of proceedings before Commissioner James R. Glass stricken out by Judge Adam C. Cliffe.
2. (a) Order of Honorable Evan A. Evans, sitting as Judge of the District Court of the Northern District of Illinois, Eastern Division, issuing writ of habeas corpus and setting date for hearing, dated January 14, 1925:
(b) Writ of certiorari directed to Commissioner James R. Glass to certify transcript of proceedings before him, dated January 14, 1925.
[fol. 92] 3. Motion to dismiss writ of habeas corpus, dated January 22, 1925.
4. Marshal's return dated January 22, 1925.
5. Order of Judge Evan A. Evans dismissing writ of habeas corpus, dated February 2, 1925.
6. Opinion of Judge Evan A. Evans rendered February 2, 1925.
7. Petition for appeal.
8. Petitioner's assignment of errors on appeal.
9. Order allowing appeal and fixing appeal bond, dated February 2, 1925.
10. Citation.
11. Stipulation for record on appeal.
12. This præcipe.

Dated Chicago, Illinois, February —, 1925.

Butler, Lamb, Foster & Pope, Attorneys for Appellant.

Service of a copy of the within præcipe is hereby acknowledged this — day of February, 1925.
Edwin A. Olson, United States Attorney, Attorney for Appellee.

[File endorsement omitted.]

[fol. 93] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the pro-

ceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled United States Ex Rel. F. C. Rutz, vs. Robert R. Levy, United States Marshal, No. 35089, as the same appear from the original records and files thereof now remaining *in my custody and control.*

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 24th day of February, A. D. 1925.

John H. R. Jamar, Clerk. (Seal of the U. S. District Court of Illinois, Northern District.)

[fol. 93½] CITATION—In usual form, showing service on Edwin A. Olson; omitted in printing

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[fol. 94] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1924

No. 935

UNITED STATES EX REL. F. C. RUTZ, Appellant,

v.

ROBERT R. LEVY, United States Marshal in and for the Northern District of Illinois

No. 936

UNITED STATES EX REL. R. R. FAUNTLEROY, Appellant,

v.

ROBERT R. LEVY, United States Marshal in and for the Northern District of Illinois

No. 937

UNITED STATES EX REL. J. R. STENECK, Appellant,

v.

ROBERT R. LEVY, United States Marshal in and for the Northern District of Illinois

No. 938

UNITED STATES EX REL. HARRY C. WANNER, Appellant,

v.

ROBERT R. LEVY, United States Marshal in and for the Northern District of Illinois

On Appeal from the District Court of the United States for the Northern District of Ohio

STIPULATION AS TO PRINTING RECORD—Filed March 16, 1925

The records in the above entitled causes being substantially similar, it is hereby stipulated between counsel for the respective parties [fol. 95] that the record in the Rutz case only be printed; that the Fauntleroy, Steneck and Wanner cases shall be submitted to the Supreme Court on motions to dismiss or affirm on the printed record in said Rutz case; and that the same judgments shall be entered in the Fauntleroy, Steneck and Wanner cases as shall be entered by the Supreme Court in the Rutz case.

Butler, Lamb, Foster & Pope, by E. Bonett Prettyman, Counsel for Appellants. Roger Shale, Special Assistant to the Attorney General, Counsel for Appellee.

March 16, 1925.

[File endorsement omitted.]

Endorsed on cover: File No. 30,900. N. Illinois D. C. U. S. Term No. 935. The United States ex Rel. F. C. Rutz, appellant, vs. Robert R. Levy, United States marshal in and for the Northern District of Illinois. Filed February 26, 1925. File No. 30,900.

(6092)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

Nos. 935, 936, 937 and 938

UNITED STATES *ex rel.* F. C. RUTZ, R. R. FAUNTLEROY, J. R. STENECK AND HARRY C. WANNER,
Appellants,

vs.

ROBERT R. LEVY, UNITED STATES MARSHAL, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM.

HERBERT POPE,
FRANK E. HARKNESS,
BENJAMIN M. PRICE,
Attorneys for Appellants.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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TABLE OF CASES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

Nos. 935, 936, 937 and 938

UNITED STATES *ex rel.* F. C. RUTZ, R. R. FAUNTLEROY, J. R. STENECK AND HARRY C. WANNER,
Appellants,

vs.

ROBERT R. LEVY, UNITED STATES MARSHAL, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM.

STATEMENT.

The rights of a defendant in a removal proceeding guaranteed to him by the Constitution as construed by this court in *Tinsley* v. *Treat,* 205 U. S. 20, would be nullified if the contention of the Government in these cases is sustained. We contend that a question of such importance should not be disposed of upon a motion to dismiss.

The appeal of Rutz (whose record is to answer for the substantially similar records in the other three appeals) grows out of two proceedings for his removal from the Northern District of Illinois to the Northern District of Ohio. After extensive hearings in which the Government was afforded every opportunity to present its evidence, Rutz was discharged by United States Commissioner Glass, who found that there was no probable cause to believe Rutz guilty of a violation of the Sherman Act charged in the indictment found against him in the Northern District of Ohio. Four days later a new complaint similar to the first complaint and based upon the same indictment was filed before District Judge Cliffe sitting as a committing magistrate. This second complaint, although admittedly for the same offense and called a *de novo* proceeding, was accompanied by no showing of error, fraud, or irregularity in the proceedings before Commissioner Glass, nor was there any claim that the Government had evidence in support of the charge not available to it in the hearing before Commissioner Glass. Judge Cliffe refused to consider evidence as to what had occurred before Commissioner Glass and treated the fact of appellant's discharge in that proceeding as wholly irrelevant.

The question presented is, therefore, whether a discharge by an examining magistrate in a removal proceeding, after a full and fair hearing on the question of of probable cause in a forum of the Government's own choosing, is to any degree a protection to the party discharged against another removal proceeding based on the same charge, or whether, as the Government contends, it has the absolute right to select another tribunal and prosecute a second proceeding in entire disregard of the earlier decision.

This is the precise question which this court took care

to leave open, when it held in *Morse* v. *United States,* 45 Sup. Ct. Rep. 209, decided February 2, 1925, that a discharge in removal proceedings was not a bar to the arrest of the party discharged in the jurisdiction in which the indictment was obtained nor to his trial upon the indictment. The court said:

> "The judgment rendered therein, (*i. e.,* in removal proceedings) *whatever may be its effect in subsequent proceedings of the same character involving the same question* * * * does not abridge the power of the trial court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment." (Italics are ours.)

The fact that this court was at pains to reserve this point in the case above cited might well be deemed a sufficient justification for this appeal and should be of itself a conclusive answer to this motion to dismiss. The Government's contention comes to this—that although a defendant has been discharged after a plenary investigation of the question of probable cause, in which it participated, and against the conduct of which it can make no allegation of error, fraud, or irregularity, it has the right arbitrarily to institute a second proceeding merely because it is dissatisfied with the result of the first hearing. Obviously, if a second proceeding can thus be instituted, the procedure can be repeated as often as the Government is defeated, until it either finds an examining magistrate who will hold the defendant, or else convinces the defendant of the futility of asserting his constitutional right to rebut the charges against him, since the only result of his making a successful defense before one examining magistrate will be to subject him to the burden of a new proceeding before another.

We submit that these appellants were entitled to prosecute their appeal against a claim of this character, without being subjected either by Judge Evans or by the Government to the imputation of bad faith, and that they are entitled to a full hearing upon the merits of their case.

That we have not stated the Government's claim too strongly will be amply demonstrated by a brief reference to the printed record.

It has been stipulated by counsel that the records in these four cases are so nearly alike that the record in the Rutz case alone need be printed, and that the other three cases shall abide the decision in that case. Counsel for the Government nevertheless have made reference to special circumstances alleged to exist in the case of one of the appellants whose record is not printed. Conceiving this reference to be a violation of the stipulation, we do not consider that it calls for comment, and we shall confine our discussion to what appears in the printed record.

The proceeding before Judge Cliffe above referred to was commenced by the filing of the complaint on December 24, 1924. Upon objection raised by counsel to the institution of this second proceeding, Judge Cliffe set for hearing on January 12, 1925, the question whether, in view of the former proceeding before Commissioner Glass, he would entertain the complaint. Upon that date counsel for appellants objected to further proceedings and offered in support of their objection affidavits of appellants setting forth the proceedings before Commissioner Glass. The affidavit of Rutz to which were attached, as exhibits, a copy of the complaint filed before Commissioner Glass and a copy of his opinion, stated that the only evidence offered by the Government was a certified copy of the indictment; that Rutz and other wit-

nesses testified and were cross-examined by counsel for the United States and that certain documentary evidence was offered for him; that no evidence in rebuttal was offered by the United States, although opportunity was afforded to do so, and that after argument the Commissioner entered an order discharging Rutz.

Counsel for the Government objected to the admission of these affidavits as irrelevant and immaterial, stating that they were *"proceeding here de novo without regard to any other proceeding in this jurisdiction."* (Rec., ...4...) Judge Cliffe sustained this objection but later permitted the affidavits to be filed purely to preserve appellants' record, and then upon motion of the Government struck them from the files. He refused to read or consider them.

Counsel for the Government offered no evidence and made no showing of any character regarding the proceedings before Commissioner Glass and made no claim or allegation of any fraud, error, irregularity or impropriety of any kind either in the rulings of the Commissioner during the hearing before him or in his findings as to probable cause, nor was any suggestion made that they expected to offer evidence at the hearing which had not been produced before the Commissioner.

Upon this record, Judge Cliffe overruled the objection to further proceedings and set the case for hearing on the question of probable cause for January 14, 1925, at two o'clock. The four appellants appeared in open court during the forenoon of January 14th and were arrested and taken into custody upon warrants issued by Judge Cliffe. Petitions for writs of habeas corpus were then presented to Circuit Judge Evans, designated and sitting in the District Court of the United States, and the writs were granted by him, returnable January 22, 1925.

Appellants were then released under bonds of $5,000 each.

On January 22, 1925, Judge Evans heard oral argument, accepted briefs and took the matter under advisement. On February 2nd he filed an opinion and entered an order quashing the writs. On the same date these appeals were taken, assignments of error filed, and supersedeas granted. The records on appeal were filed in this court on February 26, 1925, and show on their face that they were completed and certified to by the clerk of the District Court on February 24, 1925.

ASSIGNMENTS OF ERROR.

The errors assigned below on behalf of appellant Rutz were that the District Court (Judge Evans) erred:

1. In refusing to hold that the detention of Rutz by the marshal under the warrant of arrest issued by Judge Cliffe was in violation of Section 2, Article III, of the Constitution, in that such warrant of arrest was issued in a second and *de novo* proceeding in disregard of the prior discharge in a similar proceeding before Commissioner Glass, who had found after a full hearing that there was no probable cause to believe that Rutz had committed the offense charged, and although there was no showing in said *de novo* proceeding of any fraud, bias, error or any impropriety whatsoever in the hearing before Commissioner Glass, or in the discharge of Rutz, or that the Government proposed or intended to offer or introduce in the *de novo* proceeding any evidence of probable cause in addition to or other than the evidence offered in said first proceeding.

2. In refusing to hold that such detention under such circumstances was in violation of the Sixth Amendment to the Constitution.

3. In refusing to hold that such detention under such circumstances was in violation of the Fifth Amendment to the Constitution.

4. In refusing to hold that such detention under such circumstances was in violation of the constitutional rights of said Rutz.

5. In refusing to hold that there was no law authorizing the institution of the second removal proceedings in view of the prior discharge after a full hearing under a complaint based upon the same alleged offense and the same indictment upon which the second removal proceeding was based.

6. In refusing to hold that the second removal proceeding was unwarranted by law.

7. In quashing the writ of habeas corpus.

BRIEF.

The Government bases its motion to dismiss or affirm "on the ground that the single question of law involved is elemental and that the appeals were not taken in good faith, but solely for the purpose of delay."

If we understand what counsel mean by the word "elemental" we do not object to its application to the question of law here involved. That the action of the court below and the contention of the Government in support thereof violate fundamental and elementary principles of the law and the Constitution is in fact the basis of this appeal, and the discussion of this point will be the best answer to the charge of bad faith in taking the appeal.

We should not refer to this charge further but for the fact that counsel for the Government, in their anxiety to have this appeal disposed of without a consideration of the merits, have again traveled outside the record by quoting on page 9 of their brief certain remarks made by Judge Evans after these appeals had been taken, and after the records had been certified to this court and dispatched to Washington for filing. The unfairness of this procedure is emphasized by the fact that counsel selected from the transcript of the very unusual discussion invited by Judge Evans after he had lost jurisdiction of these cases, only that part which served their purpose, and suppressed the portion which would have demonstrated that Judge Evans wholly misapprehended the facts. If this court were to follow the Government outside of the record, it would find that Judge Evans' remarks were due to his misunderstanding as to the time when the record had to be filed in this court and to his ignorance of the fact

that it had already been certified by the clerk of the District Court and sent to Washington for filing. He was under the erroneous impression that counsel were not required to file the record for at least ninety days and intended to delay filing it till the end of such period. He was also under the impression that the recent act amending the Judicial Code was effective February 13, 1925, the date of its enactment, instead of May 13, 1925, and was insistent with counsel that because of the amendment they should appeal to the Circuit Court of Appeals. The remarks quoted in the Government's brief were made before Judge Evans had been informed that the appeal to the Supreme Court had practically been perfected.

It is true that Judge Evans had already stated in his opinion that he thought the proceeding before him was for the purpose of delay. He cited no facts to support this conclusion, however, for the very good reason that there was none. And, with all deference to Judge Evans, we insist that other statements contained in his opinion are so clearly contrary to the facts disclosed by the record as to cast doubt upon his conclusions on any matter of fact arising in this case. Thus, in the excerpt from his opinion quoted on page 8 of the Government's brief, Judge Evans said:

> "There is not the slightest suggestion that the Judge before whom the present application is pending will not give to the decision of the Court Commissioner such weight as it deserves."

And again:

> "The petition before Judge Cliffe did not even disclose the prior proceedings before Commissioner Glass. The Judge therefore was clearly authorized to proceed with the hearing."

The record shows, however, that objection to the *de novo* proceeding before Judge Cliffe, based upon the

prior discharge by Commissioner Glass, was made at the very start, in other words, when the second complaint was filed. (Rec., 1.) Moreover, the transcript of the hearing before Judge Cliffe on January 12th shows that, without having had any opportunity to read the Commissioner's transcript, and without even looking at the affidavits setting forth the nature and result of the proceedings before the Commissioner, he announced that the Commissioner had exceeded his authority,—that he "arrogated or took upon himself the right to hear the case in its original inception." This pronouncement was manifestly based upon hearsay, and the transcript of this proceeding of January 12th shows that on this point Judge Cliffe had his mind made up before the hearing commenced. (Rec., 11, 12.)

The slightest consideration of the affidavits setting forth the proceedings before Commissioner Glass would have shown also that the Commissioner had not arrogated to himself "the right to hear the case in its original inception." The only evidence offered by the Government was the indictment itself, and the Commissioner cannot be criticized for having allowed the appellant to introduce more evidence than the Commissioner thought was necessary to rebut any *prima facie* case made by the indictment.

From the foregoing it clearly appears that Judge Evans' statements, quoted above, are just as erroneous as his later remarks, on and off the record, concerning delay. He, as well as Judge Cliffe, not only strayed from the record but indulged in assumptions entirely inconsistent with the facts appearing in the record, and the Government's brief exhibits the same tendencies.

Finally, it may well be asked what it is that is being delayed by the appeal in this case? There is nothing in

this record to show that any other proceeding is being delayed by this appeal. It is a matter of public record that the trial of the case in the Northern District of Ohio has been postponed indefinitely, on the application of the Government itself and over the objection of counsel for defendants already in court, to await the disposition of various removal proceedings, some of which have not yet been commenced.

As we have already indicated, however, there is a conclusive answer to any charge of delay. If the point upon which an appeal is taken is of substantial importance, and if it affords fair ground for controversy, and is unsettled by the authorities, no charge of bad faith can lie against those taking the appeal, even though it does involve delay, and even though the Government is the party delayed, nor should it be disposed of on a motion to dismiss or affirm. We assert that the question involved in this appeal is of that character.

We contend, *first*, that the record here presents a question not only of vital interest to the appellants, but also of peculiar importance in all criminal proceedings under such statutes as the Sherman Act, where the defendant sought to be removed from one part of the country for trial in another may be put to enormous expense and great inconvenience if required to bring numerous witnesses a long distance in order to make a successful defense to an unfounded charge; *second*, that the Government's position in this case, and the action of the lower court in sustaining that position, is not merely open to controversy, but that it is unsupported by any decided case, and is wholly inconsistent with the conception of the constitutional rights of the accused in a removal proceeding established by this court in *Tinsley* v. *Treat*, 205 U. S. 20; *third*, that where an issue has been

judicially determined, whether that adjudication is technically *res judicata* or not, there is a well settled rule that another judicial tribunal exercising concurrent jurisdiction has no power to retry or redetermine the same issue unless there is a showing of arbitrary action or exceptional impropriety in the judicial conduct of the first trial or hearing.

I.

THE IMPORTANCE OF THE QUESTION.

The importance to these appellants, and to other defendants in this same proceeding who have already been or may be discharged in other districts, of the question involved in this appeal, cannot be a subject of controversy. The Government has attempted to remove them to Cleveland there to undergo a long and burdensome trial on a criminal charge. The nature of this burden is revealed by the wholly indefinite and ambiguous character of the indictment in this case, which makes it possible that a defendant might be removed on the suggestion of one conspiracy or combination and tried in the Northern District of Ohio on an entirely different conspiracy or combination.

Where, as in the removal proceeding out of which this case grows, it is held that such an indictment makes a *prima facie* case, and the defendant then claims his constitutional right to rebut that case, he is called upon of necessity to rebut every possible kind of combination between himself and any other defendant which it may be claimed is provable under the indictment in the district where the case is triable. These appellants assumed that burden before Commissioner Glass, the officer selected by the Government to hear the case, and were successful

in establishing to his satisfaction that there was no probable cause to believe them guilty of the offense charged. Within four days after their discharge by Commissioner Glass, they were faced with the proposition that the Government regarded the proceeding in which they obtained their discharge as utterly futile and inept, and did not consider that its right to remove them had been affected in any degree by the finding of the Commissioner.

That this is the precise purport and effect of the Government's claim is undeniable. Counsel for the Government and Judge Cliffe made it absolutely clear that the character of the former proceeding was not in question. This record shows that the inquiry before Commissioner Glass was properly conducted and that the proof of lack of probable cause was plenary and conclusive. This court certainly cannot assume that this was not the case. But it is unnecessary to resort to any presumption, since the very heart of the Government's contention is that the fact of a former inquiry was irrelevant.

If the Government's view is correct, the question which immediately confronts a defendant in a removal proceeding is whether the constitutional right to contest removal on the ground of lack of probable cause is of any value. Is it worth his while to go to the expense and trouble of producing his witnesses to be cross-examined and his documents to be inspected by counsel for the Government, if the Government may immediately rearrest him and retry the question of probable cause before another examining magistrate? And since it necessarily follows from the Government's contention that it can ignore not only one defeat but any number of successive defeats, is it not obvious that removal proceedings resolve themselves into a contest of endurance, with the odds so heavily in favor of the Government that the only wise

course for the accused is to surrender his constituional right to resist removal, and submit at once to the jurisdiction of the trial court?

Counsel for the Government ignore this aspect of the case altogether. The suggestion of Judge Evans that Judge Cliffe might at some time have considered the record before Commissioner Glass does not relieve the difficulty which confronted the appellant. The question is whether, having once fully tried the question of probable cause before a tribunal having competent jurisdiction, he is to be harassed by repeated arrests and the necessity of repeated retrials of the same question before other tribunals of concurrent jurisdiction. If that is the case, his constitutional rights in removal proceedings are worthless. There was no possible way of testing that question except by objecting at the threshold to proceeding with the second hearing.

Any claim that this question is frivolous can be based only upon the notion that any resistance to removal proceedings before an examining magistrate is vexatious and obstructive; that the examining magistrate is a mere appendage of the Department of Justice; that, as counsel say in their brief (p. 13), "the most he can do is to order a defendant committed pending application for the issuance of a warrant of removal by a judge," and that an order of discharge is in reality an abuse of his powers.

II.

THE AUTHORITIES CITED BY COUNSEL FOR THE GOVERNMENT NOT ONLY DO NOT SUPPORT THEIR CONTENTION, BUT, SO FAR AS THEY HAVE ANY BEARING, ARE AGAINST IT, AND THE CONTENTION IS WHOLLY INCONSISTENT WITH THE DOCTRINE ESTABLISHED BY THIS COURT IN TINSLEY V. TREAT, 205 U. S. 20.

The position of counsel for the Government is that they were entitled to institute the proceedings before Judge Cliffe in entire disregard of the discharge of the appellants by Commissioner Glass, because that discharge was not an adjudication of the question of probable cause, and therefore not a bar to a second proceeding.

The only authorities cited by counsel as directly sustaining this contention are *United States* v. *Haas,* 167 Fed. 211, and *Morse* v. *United States, supra,* decided by this court February 2, 1925. As we have already pointed out, the latter case decided only that a discharge in removal proceedings did not preclude an arrest in the jurisdiction where the indictment was returned and a trial on the indictment, and expressly recognized that the effect of such a discharge in subsequent removal proceedings presented a different question.

The passing remark in *United States* v. *Haas, supra,* to the effect that "the decision of a committing magistrate refusing to hold a prisoner for trial *or removal* * * * is not *res adjudicata*" was not necessary to the decision and is entitled to little weight. The report shows that counsel for the defense admitted that a decision of a committing magistrate in removal proceedings was not "technically *res adjudicata*" and therefore the question was not in controversy. Moreover, the authorities cited in the opinion have nothing to do with re-

moval proceedings, but deal only with preliminary examinations before committing magistrates where the question was whether an accused should be held for a crime committed in the jurisdiction where the arrest took place. The court appears to have jumped to the conclusion that because a decision in such a proceeding was not *res judicata,* a decision of an examining magistrate in a removal proceeding could not be *res judicata.* But the distinction between the two proceedings is fundamental. This court has often held that in the class of cases first mentioned the preliminary hearing can be entirely dispensed with without violating any constitutional right of the accused.

Goldsby v. *United States,* 160 U. S. 70.
Lem Woon v. *Oregon,* 229 U. S. 586.
Ocampo v. *United States,* 234 U. S. 91.

But in *Tinsley* v. *Treat,* 205 U. S. 20, this court squarely held that when a proceeding was brought under Section 1014 with a view to removing the accused to another district, a preliminary hearing was a constitutional right of the accused and that the exclusion of evidence in rebuttal of the accusation was a violation of the Constitution.

The fact that the preliminary examination in a removal proceeding has its sanction in the Constitution cannot be ignored. Counsel for the Government consistently endeavor to belittle the function of the examining magistrate in such a proceeding. They refer to the fact that he cannot be considered as holding a court of the United States. But since the decision in *Tinsley* v. *Treat* it cannot be denied that he does perform a judicial function, and that, in the performance of that function, a specific duty is laid on him to protect the constitutional rights of the accused as declared by this court.

It is, we submit, impossible to reconcile this decision with the view advocated by the Government that an order of discharge in a removal proceeding is not only not technically *res adjudicata* but is a mere idle gesture having no legal consequence, since it may be immediately nullified by a new warrant and another arrest. Apparently the Government regards the constitutional right of the accused, established by *Tinsley* v. *Treat,* as a right to walk out of the commissioner's office into the arms of a United States marshal armed with another warrant for his arrest for the very offense which the commissioner had found no probable cause to believe he committed. It clearly appears from that decision, however, that the right recognized by this court is the right not to be removed to another district except upon a finding of probable cause to believe that he has committed an offense there, and, unless the discharge by the commissioner protects that right, the commissioner is deprived of jurisdiction to perform the function which this court has said he shall perform. Obviously no such fundamental question as this was presented or decided in *Morse* v. *United States, supra.*

As we have shown, counsel cite no authority for the Government's contention. Indeed, in the *Haas* case itself, although the court said that the technical doctrine of *res judicata* did not apply, it also held that the Government did not have the absolute right to a second hearing which is definitely claimed for it in this case. After using the language quoted by counsel on page 14 of their brief, the court went on to say (p. 212):

> "*But ordinarily, in the absence of special circumstances, the decision of any judicial officer having jurisdiction should be held to be conclusive on the same set of facts.* In this application I sit as a committing magistrate, with exactly similar jurisdiction as that of the commissioner. The evidence submitted is precisely the same in both cases, and *it would be*

> *entirely proper in this case to discharge the prisoner upon the ground that he has already been discharged by the judicial decision of another magistrate having concurrent jurisdiction.* Moreover, I have read the very elaborate and able opinion of Mr. Commissioner Ridgway, and concur entirely in his conclusions and in the grounds upon which he basis them." (Italics are ours.)

And in the case of *In re Wood*, 95 Fed. 288, where a district judge was applied to for removal of a defendant who had been discharged by a commissioner, the District Judge said:

> "* * * I am of the opinion that the action of the commissioner in an application of this kind, upon the full consideration of the testimony offered, and especially where such testimony is that upon which the indictment is found, should be final. *It should not be open to the government to file repeated petitions before different commissioners upon substantially the same state of facts.* If, for any reason, the government was unable to obtain the testimony of witnesses, and its case was therefore not fully presented, this would afford ground for a rehearing before the commissioner having cognizance of the matter. Where the hearing has been full and complete, the action of one commissioner in refusing to commit the defendant, unless such action has been arbitrary and in manifest disregard of his duty, ought not to be made the subject of review before a second commissioner." (Italics are ours.)

An exhaustive search has failed to disclose any other authority directly bearing on the question involved in this appeal. Both of these cases are directly opposed to the Government's claim of an absolute and unqualified right to a second hearing on the question of probable cause, and the *Wood* case is directly in favor of the view that the decision of an examining magistrate discharging a defendant after a full hearing is final.

The fact that the question has never been passed upon in any other reported case adds weight and substance to our contention. Few persons accused of crime in removal proceedings and discharged after a full hearing on the question of probable cause would tamely submit to the nullification of that discharge by a new accusation and a new arrest based on the same facts, and the fact that the reports show that no court of appellate jurisdiction has ever been called upon to pass upon the right to a second hearing is persuasive evidence that the law officers of the United States themselves have taken the view, with practical unanimity, that no such right exists. Indeed, the record in this case shows that the assertion was made before Judge Cliffe, and remained unchallenged, that in twenty-five years there had been no case in the Northern District of Illinois in which, after the accused in removal proceedings had been discharged by a commissioner, a second hearing was held by a District Judge on the same charge in utter disregard of the first proceeding.

III.

WHERE AN ISSUE HAS BEEN JUDICIALLY DETERMINED, WHETHER THAT ADJUDICATION IS TECHNICALLY RES JUDICATA OR NOT, THERE IS A WELL SETTLED RULE THAT ANOTHER JUDICIAL TRIBUNAL EXERCISING CONCURRENT JURISDICTION HAS NO POWER TO RETRY OR REDETERMINE THE SAME ISSUE UNLESS THERE IS A SHOWING OF ARBITRARY ACTION OR EXCEPTIONAL IMPROPRIETY IN THE JUDICIAL CONDUCT OF THE FIRST TRIAL OR HEARING.

This question will be more fully dealt with in the argument on the merits. For the purposes of the argument on the present motion a mere outline must suffice. A cursory review of some of the authorities will show at

least that counsel for the Government have misconceived or misstated the questions involved in this case.

In criminal cases as well as in civil cases the adjudication of any issue or fact by a judicial tribunal having jurisdiction to determine such issue or fact is conclusive in a subsequent proceeding between the same parties, even though this court has itself held that the original adjudication was wrong.

United States v. *Oppenheimer,* 242 U. S. 85.

This court there stated the rule in a way which is clearly applicable to the adjudication of the issue of probable cause by Commissioner Glass in this case. The court said (pages 87-88):

> "Upon the merits the proposition of the Government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. * * *
>
> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt,* 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time."

The final adjudication of the issue of probable cause

in a removal case by a judicial tribunal having jurisdiction to determine such issue falls clearly within the general rule as thus stated by this court. Such an adjudication does not determine, of course, any issue except the issue of probable cause for removal, but it does determine that issue just as conclusively as the issue of guilty or not guilty will be determined by a final adjudication in the court at Cleveland between the parties in that court.

Furthermore, this court has expressly held that this rule as to a former adjudication is not modified by the fact that the law allowed no appeal from the former adjudication.

Johnson Company v. *Wharton*, 152 U. S. 252.

This court has also held that such a rule is applicable even when it necessarily results in impeding the action of the Government in matters involving public authority.

New Orleans v. *Citizens' Bank*, 167 U. S. 371.

The general rule that, except under special circumstances, a former adjudication must be held conclusive as to any issue or fact so determined is illustrated by a great variety of cases. It is applied even in the case of administrative officers who are authorized in special cases to determine questions of fact or mixed questions of law and fact.

Lane v. *Watts*, 234 U. S. 525.
Noble v. *Union River Logging R. R.* 147 U. S. 165.
Howe v. *Parker*, 190 Fed. 738 (C. C. A.).
Ross v. *Stewart*, 227 U. S. 530.
Ross v. *Day*, 232 U. S. 110.
Marquez v. *Frisbie*, 101 U. S. 473.

The obligatory character of this rule is fully recognized in an analogous case, *United States* v. *Yeung Chu*

Keng, 140 Fed. 748. In that case, deportation proceedings had been instituted against a native of China, and after a full hearing before a United States commissioner the defendant was discharged, only to be immediately arrested again upon a complaint filed in the District Court. In discussing whether the defendant could thus be proceeded against a second time, the court said:

> "I shall hold that he cannot be, where the proceeding before the commissioner appears to have been regular, and a hearing has been had, and a decision regularly made. *The ruling of the commissioner may have been erroneous—that is, against the evidence or contrary to law; but, in the absence of some showing of fraud or gross irregularity amounting to positive abuse, his judgment must be regarded as a determination of the issue.*
>
> * * * Congress might have intrusted the final determination of the facts on which the right to remain in the United States depends to executive officers, and their judgment of the existence of those facts might have been made final. It has not done so, but the fact that it has authorized judicial investigation does not justify the opinion that repeated investigation may be had, where the status of the Chinese person has been once regularly investigated, and he has been discharged, and *the government seeks another investigation upon substantially the same facts as it relied on in the first inquiry.*" (Italics are ours.)

See, also:

Ex parte Wong Yee Toon, 227 Fed. 247.

Decisions on the effect of a discharge in a habeas corpus proceeding have a distinct bearing upon the question here involved. Even where the accused has been remanded this court has indicated that in many circumstances the prior decision remanding the accused should be given controlling weight.

Salinger v. *Loisel,* 265 U. S. 224.

Wong Doo v. *United States,* 265 U. S. 239.

But where the accused has been discharged the court has gone further. In *Collins* v. *Loisel*, 262 U. S. 426, this Court held that the particular discharge in that case was not *res judicata*, but used the following significant language:

> "It is true that the Fifth Amendment in providing against double jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases, *United States* v. *Oppenheimer*, 242 U. S. 85; and that a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as *res judicata*. But the judgment is *res judicata* only that he was at the time illegally in custody, *and of the issues of law and fact necessarily involved in that result.* The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular * * *." (p. 430.) (Italics are ours.)

And the following references appear in the accompanying footnote:

> "Compare *Ex parte Milburn*, 9 Pet. 704, 710; *In re White*, 45 Fed. 237; *United States* v. *Chung Shee*, 71 Fed. 277; 76 Fed. 951; *Ex parte Gagliardi*, 284 Fed. 190."

The clear inference to be drawn from these references, as well as from *Collins* v. *Loisel, supra*, is, as pointed out in *In re White, supra*, that a discharge on habeas corpus going to the merits is *res judicata* but where based on a mere technicality or irregularity, the discharge is not *res judicata*. Thus in *Ex parte Milburn, supra*, it was clear that there had been no determination on the merits and the court held that the prior discharge was not conclusive, whereas in *United States* v. *Chung Shee, supra*, where there had been a full hearing on the issue involved in the prior discharge, the Circuit Court of Appeals held that the discharge

> "* * * was an adjudication of the title of the de-

> fendant in error to be and remain in the United States, upon the facts which were involved upon the hearing of the writ. It is not claimed that she is amenable to deportation by reason of any fact arising since the date of that adjudication. * * * She cannot again be lawfully arrested and held *upon the same facts that were in issue in the former proceeding.*" (Italics are ours.)

Of the cases just mentioned the *Chung Shee* case bears the closest analogy to the present case. *Ex parte Gagliardi, supra,* is to the same effect.

It is submitted that Commissioner Glass's finding that there was no probable cause in the present case was a judicial determination "of the issues of law and fact necessarily involved in that result" (*Collins* v. *Loisel, supra*), and that Judge Cliffe had no jurisdiction to rehear and redetermine those issues.

That where the effect of a prior adjudication of an issue of fact arises, it is a question which is presented at the outset, and before a new hearing is had, is shown by the cases in which equity grants an injunction against a subsequent hearing by an administrative officer exercising judicial power to redetermine an issue or fact which has previously been determined by another officer having jurisdiction to decide such issue or fact, or where the parties themselves are enjoined from proceeding again in another court.

> *Lane* v. *Watts,* 234 U. S. 525.
>
> *Noble* v. *Union River Logging R. R.* 147 U. S. 165.
>
> *Toledo Scale Co.* v. *Computing Scale Co.* 281 Fed. 488.

An exhaustive examination of the authorities has failed to disclose any decided case, or any judicial utterance, in conflict with the view stated in the cases above

cited, and it is difficult to conceive that a different rule could be laid down by an American court of justice. Obviously, the bringing of successive indictments does not present an analogous situation. The finding by a grand jury is not in any sense a judicial act. It is an *ex parte* proceeding. The defendant is not present before the grand jury and has no right to present testimony. There is no issue of fact or law to be heard and determined between parties properly before a judicial tribunal. The indictment is a mere charge and does not determine any substantive right of the defendant.

It is clear also that preliminary hearings conducted by a magistrate under state statutes for the purpose of committing the accused are not similar in character to a removal hearing under Section 1014. Under the state practice the entire preliminary hearing may be dispensed with without violating any constitutional right of the accused. Furthermore, the removal of the defendant to another jurisdiction is not involved.

There are particular reasons why the general rule as to the effect of a former adjudication should be held to apply to removal cases under Section 1014 where the defendant has been discharged after a full hearing. As we have already pointed out, the right to a hearing is firmly based upon the Constitution itself and any infringement of that right is not mere error but a violation of the constitutional rights of the accused. In *Harlan* v. *McGourin*, 218 U. S. 442, this Court, referring to *Tinsley* v. *Treat*, said:

> "It was held that while an indictment constitutes *prima facie* evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the State and

district where the alleged offense was committed, and therefore reviewable under *habeas corpus* proceedings."

To hold that one examining magistrate has jurisdiction to inquire into or to correct error committed by another examining magistrate is to fly in the face of one of the most elementary of the principles upon which the orderly administration of justice is founded.

The correction of error in a judicial decision is a function of tribunals having appellate jurisdiction. Any departure from this rule would plunge our judicial system into chaos. Indeed, the disorder and confusion which would result if judicial officers having concurrent jurisdiction were to be permitted to review each other's decisions are so obvious that courts are rarely asked to exercise any such jurisdiction. The authorities already cited, however, are clearly based upon this fundamental consideration, and in one of them—*United States* v. *Yeung Chu Keng, supra*,—the court pointed out that the application for a rehearing was in effect an attempt to get a district judge to exercise an appellate jurisdiction which he did not possess. The court said (p. 751):

> "If, when a Chinese person is discharged by a United States commissioner after hearing, another complaint may be laid before a United States District Court or judge, based upon the same facts, it is in effect a re-examination into the facts. If one re-examination may be had, why not several before different commissioners? * * * Certainly there is no express power given by statute to this court to revise a decision by a commissioner in a Chinese case, where the defendant has been discharged (no appeal even is given to the government), *and in the absence of such express power of revision this court does not possess authority to do that which in practical effect is revision.*" (Italics are ours.)

The application of this reasoning to the present case is obvious. Under Section 1014, as under the statute providing for deportation, an order of discharge is not

appealable, and the institution by the Government of the second proceeding for the removal of the appellant in the instant case must therefore be regarded as an attempt to obtain by indirection a right which Congress has not seen fit to grant.

If this method,—unsanctioned by statute, unwarranted by judicial precedent—of obtaining a review of an order of discharge is to be allowed, the right to resist removal, hitherto so sedulously protected by this court, becomes of little value. Counsel will still be bound to advise their clients that they have a constitutional right to a hearing on removal, but it is obvious that they will also be bound to advise them that it rests entirely with the counsel prosecuting the case to make the exercise of that right so burdensome, and render the chance of ultimate success so remote, as to make it practically valueless. That any Government official in a country claiming to be free should have such power would be intolerable.

CONCLUSION.

In this state of the authorities, it is submitted that the Government's motion to dismiss or affirm this appeal is out of place. The only authority cited in favor of its contention is in fact opposed to it. It is not claimed, and as we believe cannot be maintained, that it is in accordance with any practice established or ever followed by any lower court in any removal proceeding. If a new and unheard of rule is to be applied in removal proceedings, a rule which will in effect destroy the rights of the accused as defined in *Tinsley* v. *Treat*, it should not be established *sub silentio* by the granting of a motion to dismiss or affirm.

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Attorneys for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES EX REL. F. C. RUTZ, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 935
UNITED STATES EX REL. R. R. FAUNTLEroy, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 936
UNITED STATES EX REL. J. R. STENECK, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 937
UNITED STATES EX REL. HARRY C. WANner, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 938

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT

The Solicitor General, on behalf of the appellee in the above-entitled causes, moves the Court to dismiss or affirm the appeals therein on the ground

that the single question of law involved is elemental and that the appeals were not taken in good faith but solely for the purpose of delay.

This motion is submitted to the Court on the record in No. 935, counsel having entered into the following stipulation:

> The records in the above entitled causes being substantially similar, it is hereby stipulated between counsel for the respective parties that the record in the *Rutz case* only be printed; that the *Fauntleroy, Steneck, and Wanner cases* shall be submitted to the Supreme Court on motions to dismiss or affirm on the printed record in said *Rutz case*; and that the same judgments shall be entered in the *Fauntleroy, Steneck, and Wanner cases* as shall be entered by the Supreme Court in the *Rutz case*.

STATEMENT

The appellants, Rutz, Fauntleroy, Steneck, and Wanner reside in the Northern District of Illinois, and the Government is seeking to remove them to the Northern District of Ohio to stand trial on an indictment returned in that district on March 27, 1924, charging them, together with 43 other persons and 47 corporations, with having engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, in violation of Section 1 of the Act of July 2, 1890 (26 Stat. 209), known as the Sherman Antitrust Act.

The institution of removal proceedings against these appellants was deferred until after the valid-

ity of the indictment had been passed upon by the trial court in the Northern District of Ohio. On July 15, 1924, the trial court overruled the demurrers and motions to quash filed by certain defendants, saying, among other things:

> * * * the indictment is unexceptionable, both as to form and substance. * * * If the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of sec. 1 of the Sherman Act.

The procedure to remove offenders against the laws of the United States from districts in which they reside, or may be apprehended, to districts where indictments may be pending against them, is laid down in Section 1014, Rev. Stat., which reads as follows:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may

> be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

In conformity with the provisions of this statute, removal proceedings against the appellants were instituted before a United States Commissioner for the Northern District of Illinois on December 2, 1924. Each of the appellants, *with the exception of Fauntleroy, who was said to be in California,* duly appeared and accepted service of the warrants issued for their arrest, and gave bond for their appearance at the time and place set for the hearing.

The hearing before the Commissioner lasted a full week. Nothing which transpired before the Commissioner is of interest here except the result. The Commissioner said, in delivering his opinion, that " it would appear that there was active competition in the malleable-iron industry, not only among members of the American Malleable Castings Association, but among those that were not members of the Association," and ordered that Rutz, Steneck, and Wanner be discharged.

The complaint pending before the Commissioner against Fauntleroy was subsequently dismissed (over the objection of his counsel) on motion of the Government because a new complaint had been filed against him before a United States District Judge.

The Commissioner discharged Rutz, Steneck, and Wanner on December 20, 1924. On December 24, 1924, a new complaint was filed before the Honorable Adam C. Cliffe, one of the Judges of the United States District Court for the Northern District of Illinois, against Rutz, Steneck, and Wanner—and also Fauntleroy, as to whom a complaint filed before the Commissioner was dismissed. Counsel for the defendants challenged the right of the Government to institute removal proceedings de novo before the court, on the ground that the action of the Commissioner in discharging the defendants was res judicata. Judge Cliffe set the matter for argument on January 12, 1925, and, instead of requiring the defendants to give bonds for their appearance, placed them in the custody of Allan J. Carter, Esq., one of their attorneys.

On January 12, 1925, after hearing oral arguments on the question whether the action of the Commissioner in discharging the defendants was res judicata, Judge Cliffe said, among other things:

> It seems to me, the thing that you are losing sight of here is that these defendants are entitled to a day in court. They are entitled to a trial according to a regular form. Now, where is that trial? That trial is where the

indictment is made, in the district of Ohio; no question about that. And any defenses are properly there.

Now, so far as the Commissioner is concerned, this is the fact, the Commissioner—I do not think that anybody will gainsay the proposition—the Commissioner is entitled to receive any evidence in his mind that might go to the question of probable cause. No question about that. It is also fundamental, this indictment, properly certified, I think there is no question, is prima facie evidence. There is no question about that. Now, it seems to me the big thing that is misconceived in this whole hearing is that the Commissioner arrogated or took upon himself the right to hear the case in its original inception. Now, he has got certain rights, but there is no question about this, the Government has got the same right to have this case heard just the same as the defendants have, and they have got a forum in which that must be determined, and all reasonable intendments, matters of common sense must be indulged in. It seems to me that this is purely technical, and *the motion is overruled,* and exception. Now, when do you want to proceed on the merits? [Italics ours.]

The court set the matter for hearing at 2 p. m. January 14, 1925. About 12 o'clock noon on January 14th, Allan J. Carter, Esq., the attorney in whose custody the defendants had been released, notified counsel for the Government that the defendants were present in court; that he proposed

to surrender them immediately; and that if they were taken into custody writs of habeas corpus would be procured, with a view to having another judge review the decision of Judge Cliffe that the discharge of the defendants by a Commissioner was not res judicata. Upon the surrender of the defendants they were promptly arrested and taken into custody, and in due course writs of habeas corpus were issued by Honorable Evan A. Evans, one of the Judges of the United States Circuit Court of Appeals, duly designated and appointed to hold a term of the United States District Court. The prisoners were released under bonds of $5,000 each for their appearance at the proper time and place.

On January 22, 1925, counsel for the Government filed a motion (1) to dismiss the petitions for writs of habeas corpus, (2) to vacate the writs of habeas corpus granted upon said petitions, and (3) to remand the petitioners to the custody of the United States Marshal for detention under warrants issued on January 14, 1925, by order of Judge Cliffe. Judge Evans heard oral arguments on this motion, accepted briefs, and took the question under advisement.

Judge Evans filed an opinion on February 2, 1925, granting the motion to quash the writs of habeas corpus. Among other things, the court stated:

> The foregoing statement serves merely as a background to assist in determining whether the Commissioner's action in find-

ing a want of probable cause is conclusive or a bar to a similar proceeding before the judge. That the court commissioner's action is not res adjudicata must be conceded. * * * If the determination by Court Commissioner Glass is not res adjudicata, then what authority is there for the writ of habeas corpus to prevent Judge Cliffe from hearing the matter? There is not the slightest suggestion that the Judge before whom the present application is pending will not give to the decision of the Court Commissioner such weight as it deserves. Yet, by this writ of habeas corpus it is sought to deny to Judge Cliffe the right to hear the removal proceedings, and such position can not be sustained by questioning whether he will give to the Court Commissioner's finding such weight as petitioners believe it is entitled to receive. Conceding the right to a hearing under any circumstance, the foundation upon which the habeas corpus proceedings were instituted crumbles. * * * It is not necessary to stress other objections to this procedure by a writ of habeas corpus. The petition before Judge Cliffe did not even disclose the prior proceedings before Commissioner Glass. The Judge therefore was clearly authorized to proceed with the hearing. He was not permitted to do so because this writ of habeas corpus was secured. *It is difficult to escape the conclusion that this proceeding was for the purpose of delay, and such practices should be condemned.* [Italics ours.]

Immediately upon the filing of the opinion by Judge Evans, counsel for the prisoners applied for and were granted an appeal to this Court. Subsequently, on February 25, 1925, Judge Evans, of his own volition, called counsel for the appellants before him to show cause why the court should not set aside the order previously entered allowing a supersedeas. In the course of a discussion of the subject Judge Evans remarked:

> * * * I, in my own mind, am convinced that that is not a real legitimate question, this question of hearing on habeas corpus. If you should argue before Judge Cliffe, the force and effect of Judge Cliffe's (*sic*) [the Commissioner's] decision, that is one thing; but on that question of habeas corpus, the more I thought about it, the less I have had the belief there is good faith back of it. Now, the writ of habeas corpus is the right way to get the case to the Supreme Court, and that is the right way to secure a delay.

ASSIGNMENTS OF ERROR

Briefly stated, the errors assigned are that the court (Judge Evans) erred:

> A. In refusing to hold that the detention of the defendants by the Marshal, under the warrants of arrest issued by Judge Cliffe, was in violation (1) of Section 2, Article III of the Constitution, (2) of the Sixth Amendment to the Constitution, (3) of the Fifth Amendment to the Constitution, and (4) of

parent and conceded," said (*Todd* v. *United States*, 158 U. S. 278, 282–283):

> He is simply an officer of the Circuit Court, appointed and removable by that court. *Rev. Stat. Sec. 627, Ex parte Hennen,* 13 Pet. 230; *United States* v. *Allred,* 155 U. S. 591. A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States. Such an examination may be had not merely before a commissioner, but also before any justice or judge of the United States, or before any chancellor, judge of a state court, mayor of a city, justice of the peace, or other state magistrate. *Rev. Stat. sec. 1014.* And it can not be pretended that one of those state officers while conducting a preliminary investigation is holding a court of the United States.

In considering the function exercised by a commissioner in committing a prisoner to await the action of a grand jury, the court *In re Martin,* Fed. Case No. 9151, said:

> If he finds probable cause to hold the party for trial, he commits him; if not, he discharges him. In neither case is his action final, or a bar to further proceedings. If the prisoner is discharged, he may be again arrested, and, on sufficient evidence, may be committed. If he is committed, he may apply to the court to reduce his bail, or the prosecuting officer may apply to have it increased, or to discharge him altogether.

> In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record. * * *

The principle of res judicata was very comprehensively stated by this Court in *Oklahoma City* v. *McMaster,* 196 U. S. 529, 533, as follows:

> Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar.

A United States Commissioner cannot enter a final judgment in a removal proceeding under Section 1014, Rev. Stat. The most he can do is to order a defendant committed pending application for and issuance of a warrant of removal by a judge.

The specific question is whether the action of a commissioner in discharging a defendant sought to be removed under Section 1014, Rev. Stat., is res judicata. At the time this question was submitted to Judge Evans, it had been specifically and author-

itatively determined in but one reported case—*United States* v. *Haas,* 167 Fed. 211, decided by District Judge Holt on May 9, 1906. In that case the court said:

> The defendant's counsel claims that the decision of Commissioner Ridgway should be held to be conclusive. He admits that such a decision is not technically res adjudicata, and the authorities so hold. The decision of a committing magistrate *refusing to hold a prisoner for trial or removal, like the grand jury's decision in refusing to find an indictment,* is not res adjudicata, *and another application can be made upon the same facts. In re Martin,* 5 Blatch. 307, Fed. Cas. No. 9,151; Cooley's Const. Lim. 404; 1 Bish. New Cr. Law, sec. 1014, par. 2; *Com.* v. *Hamilton,* 129 Mass. 479.

On the very same day Judge Evans filed his opinion holding that the action of the commissioner in discharging the appellants herein was not res judicata, and in the course of which he stated that the case of *United States* v. *Haas,* 167 Fed. 211, justified special reference, this Court handed down its opinion in the case of *Morse* v. *The United States* (No. 597, Oct. Term, 1924), in which it held:

> The judgment rendered therein, whatever may be its effect in subsequent proceedings of the same character involving the same question—*Salinger* v. *Loisel,* 265 U. S. 224, 230–232; *Collins* v. *Loisel,* 262 U. S. 426, 430; *United States* v. *Haas,* 167 Fed. Rep. 211, 212—does not abridge the power of the trial

court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment.

CONCLUSION

It is respectfully submitted that the appeals should be dismissed or the orders of the court below affirmed, and the mandate of the court sent down forthwith.

JAMES M. BECK,
Solicitor General.

MARCH, 1925.

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UNITED STATES EX REL. RUTZ *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. FAUNTLEROY *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. STENECK *v.* LEVY, U. S. MARSHAL.

UNITED STATES EX REL. WANNER *v.* LEVY, U. S. MARSHAL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 935, 936, 937, 938. Submitted April 13, 1925.—Decided May 25, 1925.

An order made by a United States Commissioner, after hearing, in a removal proceeding (R. S. 1014), discharging the defendant for want of probable cause, may be persuasive but it is not controlling upon a like application made later in the same district to the District Judge. P. 393.

3 Fed. (2d) 816, affirmed.

APPEALS from judgments of the District Court quashing writs of *habeas corpus*.

Messrs. Herbert Pope, Frank E. Harkness and *Benjamin M. Price*, for appellants.

Morse v. *United States*, 267 U. S. 80 decided only that a discharge in removal proceedings did not preclude an arrest in the jurisdiction where the indictment was returned and a trial on the indictment, and expressly recognized that the effect of such a discharge in subsequent removal proceedings presented a different question.

The passing remark in *United States* v. *Haas*, 167 Fed. 211, to the effect that " the decision of a committing magistrate refusing to hold a prisoner for trial *or removal* . . . is not *res adjudicata* " was not necessary to the de-

cision and is entitled to little weight. The report shows that counsel for the defense admitted that a decision of a committing magistrate in removal proceedings was not "technically *res adjudicata*" and therefore the question was not in controversy. Moreover, the authorities cited in the opinion have nothing to do with removal proceedings, but deal only with preliminary examinations before committing magistrates where the question was whether an accused should be held for a crime committed in the jurisdiction where the arrest took place. The court appears to have jumped to the conclusion that because a decision in such a proceeding was not *res judicata*, a decision of an examining magistrate in a removal proceeding could not be *res judicata*. But the distinction between the two proceedings is fundamental. This court has often held that in the class of cases first mentioned the preliminary hearing can be entirely dispensed with without violating any constitutional right of the accused. *Goldsby* v. *United States*, 160 U. S. 70; *Lem Woon* v. *Oregon*, 229 U. S. 586; *Ocampo* v. *United States*, 234 U. S. 91. But in *Tinsley* v. *Treat*, 205 U. S. 20, this court squarely held that when a proceeding was brought under § 1014 with a view to removing the accused to another district, a preliminary hearing was a constitutional right of the accused and that the exclusion of evidence in rebuttal of the accusation was a violation of the Constitution. It is, we submit, impossible to reconcile this decision with the view advocated by the Government that an order of discharge in a removal proceeding is not only not technically *res judicata* but is a mere idle gesture having no legal consequence, since it may be immediately nullified by a new warrant and another arrest. *In re Wood*, 95 Fed. 288.

Where an issue has been judicially determined, whether that adjudication is technically *res judicata* or not, there is a well settled rule that another judicial tribunal exer-

cising concurrent jurisdiction has no power to retry or redetermine the same issue unless there is a showing of arbitrary action or exceptional impropriety in the judicial conduct of the first trial or hearing. *United States* v. *Oppenheimer*, 242 U. S. 85; *Johnson Company* v. *Wharton*, 152 U. S. 252; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371; *Lane* v. *Watts*, 234 U. S. 525; *Noble* v. *Union River Logging R. R.* 147 U. S. 165; *Howe* v. *Parker*, 190 Fed. 738; *Ross v. Stewart*, 227 U. S. 530; *Ross* v. *Day*, 232 U. S. 110; *Marquez* v. *Frisbie*, 101 U. S. 473; *United States* v. *Yeung Chu Keng*, 140 Fed. 748; *Ex parte Wong Yee Toon*, 227 Fed. 247.

Decisions on the effect of a discharge in a *habeas corpus* proceeding have a distinct bearing upon the question here involved. Even where the accused has been remanded this court has indicated that in many circumstances the prior decision remanding the accused should be given controlling weight. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239.

There are particular reasons why the general rule as to the effect of a former adjudication should be held to apply to removal cases under § 1014 where the defendant has been discharged after a full hearing. As we have already pointed out, the right to a hearing is firmly based upon the Constitution itself and any infringement of that right is not mere error but a violation of the constitutional rights of the accused. *Harlan* v. *McGourin*, 218 U. S. 442.

The Solicitor General for the United States.

Mr. Justice Sutherland delivered the opinion of the Court.

The appellants in these several appeals were indicted in the Federal District Court for the Northern District of Ohio, along with other persons and a number of cor-

porations, for a violation of the Sherman Act. Proceedings were brought under § 1014 R. S. before a United States commissioner to remove them from Illinois to the trial district in Ohio. After a hearing the commissioner ordered their discharge for want of probable cause. Subsequently, similar proceedings were instituted before a federal district judge of the Illinois district, and appellants were taken into custody by the United States marshal upon a warrant issued by the district judge. Thereupon, in advance of a hearing, they sued out writs of *habeas corpus* in the court below seeking to be discharged upon the ground that the proceedings before the district judge were without authority of law and in violation of their constitutional and statutory rights. The specific ground relied upon was that their discharge by the commissioner for want of probable cause after a hearing was an adjudication upon that question and a bar to a second proceeding. The court below held otherwise and entered orders quashing the writs. 3 Fed. Rep. (2d) 816. The Government has moved this Court to dismiss the appeals or affirm the judgments for lack of substance and on the ground that the appeals were taken solely for delay. The motion to affirm must be sustained.

Under state law it has uniformly been held that the discharge of an accused person upon a preliminary examination for want of probable cause constitutes no bar to a subsequent preliminary examination before another magistrate. Such an examination is not a trial in any sense and does not operate to put the defendant in jeopardy. *Marston* v. *Jenness*, 11 N. H. 156, 161–162; *Nicholson* v. *The State, ex rel. Collins*, 72 Ala. 176, 178; *Ex parte Crawlin*, 92 Ala. 101; *Ex parte Fenton*, 77 Cal. 183; *State* v. *Jones*, 16 Kan. 608, 610; *In re Garst*, 10 Neb. 78, 81; *In re Oxley and Mulvaney*, 38 Nev. 379, 383. The same rule applies in extradition proceedings. *In re Kelly*, 26 Fed. Rep. 852; *Collins* v. *Loisel*, 262 U. S. 426,

429. "The functions of the commissioner and the court in removal proceedings under § 1014 are of like character and exercised with like effect." *Morse* v. *United States*, 267 U. S. 80. The utmost that can be said is that the decision of a commissioner favorable to the accused is persuasive and may be sufficient to justify like action upon a second application; but it is not controlling. Undoubtedly, care should be exercised by the magistrate to whom a subsequent application for removal is made to see that the accused is not oppressed by repeated and unwarranted petitions for removal. *United States* v. *Haas*, 167 Fed. Rep. 211, 212; and see, generally, *Salinger* v. *Loisel*, 265 U. S. 224, 230–232. There is nothing to suggest that the judge to whom the second application was made here will fail in that respect.

Judgments affirmed.